राजपत्र, हिमाचल प्रदेश

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

मंगलवार, 22 मई, 2018 / 01 ज्येष्ठ, 1940

हिमाचल प्रदेश सरकार

LABOUR AND EMPLOYMENT DEPARTMENT

NOTIFICATION

Shimla, the 9th March, 2018

No. Shram (A) 6-1/2018 (Awards).—In exercise of the powers vested under section 17 (1) of the Industrial Disputes Act 1947, the Governor Himachal Pradesh is pleased to order the publication of awards of the following cases announced by the Presiding Officer, Labour Court Shimla on the website of the Department of Labour & Employment Government of Himachal Pradesh:—

Sl. No.	Reference/ Application	Title	Section
1.	Ref. 74/2013	Sh. Vijay Kumar V/s M/s GVK EMRI, JP Motors Building, Village Anji, Solan, Distt. Solan & Ors.	10
2.	Ref. 52/2014	Sh. Prem Singh V/s M/s GVK Emergency Management Research Institute, Kumarhatti, Near J.P. Motor, Village Samlesh, Distt Solan, H.P. & Anr.	10
3.	Ref. 73/2013	Ms. Sarika Patiyal V/s M/s GVK EMRI, J.P. Motors Building, Village Anji, Solan, Distt. Solan & Ors..	10
4.	Ref. 31/2015	Sh. Raj Kumar V/s M/s Indo Farm Equipment Limited, EPIP, Phase-II, Village Thana, P.O. Baddi, Distt. Solan H.P.	10
5.	Ref. 128/2016	Sh. Daya Nand V/s The XEN, IPH, Kasumpti, Distt Shimla, H.P.	10
6.	Ref. 57/2016	Sh. Roshan Lal V/s The Executive Engineer, Forest, Forest Department, Talland, Shimla, H.P.	10
7.	Ref. 56/2016	Sh. Sunil Kumar V/s The CEO (SEHB), M.C. Shimla, H.P.	10
8.	Ref. 43/2016	Sh. Ravinder Kumar V/s M/s Innova Captab, 81-B-EPIP, Phase-I, Jharmajri, Baddi, Distt. Solan, H.P.	10
9.	Ref. 164/2017	Sh.Shree Dev V/s The XEN, IPH, Pooh, Distt. Kinnaur, H.P.	10
10.	Ref. 96/2017	Sh. Jai Dev V/s M/s Akron India Pvt. Limited, Poanta Sahib, Distt. Sirmaur, H.P.	10

By order,

NISHA SINGH, IAS
Addl. Chief Secretary (Lab. & Emp.).

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-**LABOUR COURT, SHIMLA**

Ref. No. 74 of 2013
Instituted on 6.10.2013
Decided on 9.1.2018

Vijay Kumar s/o Sh. Mast Ram Sharma, V.P.O. Kangra, Tehsil Ward No. 1, Tehsil and Distt. Kangra, through: J.C. Bhardwaj, President: HP-AITUC, H.Q: Saproon, Solan, H.P.

..Petitioner

Versus

1. M/s GVK EMRI, J.P. Motors Building, Village Anji, Barog Bye-Pass Solan, Distt. Solan, H.P. (Work Office).

2. M/s Adecco Flexione Workforce Solution Pvt. Ltd., C-127, Basement Level, Satguru Infotech Phase-VIII Industrial Area Mohali - 160071 (Area Office).

3. M/s Adecco, India Pvt. Ltd. No. 2, NAL Wind Tunnel Road, Murugeshpalya, Bangolore (Corporate Office).

..Respondents

Reference under section 10 of the Industrial Disputes Act, 1947.

For petitioner	:	Shri J.C Bhardwaj, AR
For respondent No. 1	:	Shri Rajat Sahotra, Advocate
For respondents No. 2 & 3	:	Shri C.M. Sharma, Advocate

AWARD

The following reference has been received from appropriate government for adjudication:

"Whether termination of the services of Shri Vijay Kumar, s/o Shri Mast Ram Sharma, r/o VPO Kangra, Ward No. 1, Tehsil & District Kangra, H.P. who was employed as Emergency Medical Technician *w.e.f.* 20.10.2012 by the Employer, (i) M/s GVK EMRI, J.P. Motors Building, Village Anji, Barog Bye-Pass Solan, District Solan, H.P. (Work Office), (ii) M/s Adecco India Private Limited, C-127, Basement Level, Satguru Infotech, Phase VIII, Industrial Area Mohali (Area Office) and (iii) M/s Adecco India Private Limited, No. 2, NAL Wind Tunnel Road, Murugeshpalya, Bangalore (Corporate Office) without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"

2. Briefly, the case of the petitioner is that on 22.12.2010, he was directly appointed by respondent No. 2 and thereafter his services were transferred on the roll of respondent No. 1 and he continued as such till 20.10.2012 when his services were illegally terminated. It is further stated that the respondents being employers of the respondent constituted under the Companies Act are working in the project for the state of Himachal Pradesh under National Rural Health Mission Program (hereinafter referred as to NRHM), hence, the department of Health Services of Himachal Pradesh is providing services to the people through the said companies by employing various skilled workers such as pharmacists, drivers and other requisites supporting staff on contract basis as per the memorandum of understanding between the management of respondents and the State of Himachal Pradesh under the department of Health Services by adopting the aforesaid scheme and operating vehicles popularly known as 108 Ambulance to facilitate and to shift the patients to the hospital in emergency. It is further stated that the petitioner was appointed as Emergency Medical Technician (EMT) and was deputed with respondent No. 1 by respondent No. 2 while practicing unfair labour practices had tried to evade the liabilities which directly rest upon respondent No. 2 as

well as on the department of Health Services. That the petitioner who is a qualified pharmacist by occupation and has undergone two years D. Pharmacy in Ayurvedic from Shiksha Bharti Samoor Kurd, Una was appointed by respondent No. 2 for operating the 108 Ambulance Services of Department of Health and remain posted at PHC Ronhat in District Sirmaur from 22.12.2010 to 18.2.2011 and thereafter his services were transferred to Civil Hospital Kangra and again his services were transferred on 24.9.2012 from Civil Hospital Kangra to Regional Civil Hospital Solan and he remained as such till 20.10.2012 when his services were illegally terminated. That since the petitioner was elected as general secretary of the union and as such the respondents terminated his services on 20.10.2012 to teach him a lesson for the formation of the union. It is also stated that the work performed by the petitioner is similar being performed by the directly employed employees in the department of Health and Services, hence, the workers employed through contractor be treated directly employed workmen for the wage/salary and for other benefits. That the work and conduct of the workman shown on the roll of the name lender contractor has been excellent throughout and the workers union made number of representations/ demands but the respondents did not consider those representations/demands of the workmen for making payments at par with directly employed employees. That the petitioner had worked as EMT continuously with 108 Ambulance without any break and had completed 240 days in each calendar year and also in twelve calendar months preceding his termination. The petitioner was working atleast 15 to 18 hours daily since the date of his appointment without payment of any over time as applicable under the law. It is stated that initially the petitioner was appointed for one year *w.e.f.* 22.12.2010 to 21.12.2011 but considering his honesty and sincerity towards the work, his services were extended from time to time by the respondents but immediately after the formation of the union, his services were illegally terminated without affording any opportunity to explain his position and without the compliance of the set procedure for retrenchment under the Industrial Disputes Act, 1947 (hereinafter referred as to Act) as neither any notice was served upon him nor any compensation was paid. It is further stated that the respondents have not closed their establishments and still are operating under the Department of Health Services and the services of the petitioner were terminated in violation of sections 25-G and 25-H of the Act. Against this back-drop a prayer has been made that the respondents be directed to reinstate the petitioner in service and regularize him as Emergency Medical Technician at the place from where he was wrongly and illegally terminated on 20.10.2012. It is further prayed that the petitioner be ordered to be reinstated with full back-wages, seniority, continuity along-with other incidental and consequential service benefits.

3. By filing separate reply, the respondent No. 1 contested the claim filed by the petitioner wherein preliminary objections have been raised qua maintainability, that there exists no cause of action in favour of the petitioner, suppression of material facts and that the petition is bad for non-joinder of necessary party. On merits, it has been denied that the petitioner was transferred on the rolls of respondent No. 1 from the roles of respondent No. 2. It is asserted that the petitioner remained on the rolls of respondent No. 2 from the date of his appointment to the date of his termination on 20.10.2012. The respondent No. 1 employed various skilled workers such as pharmacists, drivers and other requisite supporting staff on contract basis as per memorandum of understanding between the State of H.P. and the management of the respondent No. 1 and the aforesaid skilled workers were supplied by respondent No. 2 to respondent No. 1, hence, these workers are on the roles of respondent No. 2 and as such any liability directly rest upon the respondent No. 2 who had employed the petitioner on his roles and it is the respondent No. 2 who is evading the liabilities without any legal and just reason. It is also asserted that any Trade Union formed by the workers union is not recognized by the management of the respondent No. 1 and no such intimation regarding the formation of any Trade Union was with the respondent No. 1. It is denied that since the petitioner was elected as General Secretary of the union, hence his services were terminated. It is asserted that the services of the petitioner were terminated by respondent No. 2. It is denied that the financial position of respondents is sound enough and can afford a little

burden in case the workmen shown on the roll of the name lender contractor's are paid the similar pay and allowances being paid to the direct employees. It is asserted that the respondent No. 1 is working with the Government under a public and private partnership scheme for providing health services and the Government is completely funding the respondent No. 1 and no funds are being put into by respondent No. 2 for providing the services and the respondent No. 2 is only managing the infrastructure and manpower to provide these facilities to the people of Himachal Pradesh. Moreover, the petitioner was found guilty of misconduct on the job on various times and has been given show cause notice and in his reply he had admitted his guilt and promised not to repeat the same. It is denied that the union made number of representations/demands but the respondents did not consider those representations/demands for making payments at par with the directly employed employees. It is further denied that the petitioner had completed 240 days in each calendar year and that he was working for 15 to 18 hours in a day. It is asserted that full and final settlement was done with the petitioner which was duly received by him. The respondent No. 1 prayed for the dismissal of the claim petition.

4. By filing separate reply, the respondents No. 2 and 3 have contested the claim filed by the petitioner wherein preliminary objections have been taken qua maintainability that the replying respondents had provide d about 555 workers to respondent No. 1 and out of them about 535 workers are still working with GVK EMRI and the services of the petitioner were terminated as per decision of respondent No. 1 and the respondents No. 2 & 3 have no objection if the petitioner is reinstated by respondent No. 1, that the agreement for services executed between respondent No. 1 and respondents No. 2 & 3 was valid upto 9.8.2013 and thereafter the respondent No. 1 refused to renew this agreement, hence, the respondents No. 2 & 3 are unable to reinstate the services of the petitioner and to regularize him. On merits, it has been asserted that the petitioner was engaged with respondent No. 1 through respondents No. 2 & 3 only as per specific requirements of respondents No. 1 by executing an agreement which was not renewed by respondent No. 1 after 9.8.2013 and as per terms and conditions of letter of employment issued to the petitioner by the respondents No. 2 & 3, it was specifically mentioned that the services of the petitioner were engaged only for respondent No. 1 for operation/plying 108 Ambulance service in State of H.P. and as such the respondent No. 1 is responsible for the termination of the services of the petitioner. It is further asserted that the respondent No. 1 is still operating under department of Health Services of State of H.P. but there are no contractual relations between respondent No. 1 and respondents No. 2 & 3 after 9.8.2013 and the respondent No. 1 is the sole authority to remove or retain a worker and the respondents No. 2 & 3 cannot force the respondent No. 1 to remove or retain a particular worker. The respondents No. 2 & 3 also prayed for the dismissal of the claim petition.

5. By filing separate rejoinders to the replies filed by the respondents, the petitioner reiterated his allegations by denying those of the respondents.

6. Pleadings of the parties gave rise to the following issues which were framed on 4.1.2016.

1. Whether the termination of the services of the petitioner *w.e.f.* 20.10.2012 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged

...OPP

2. If issue No. 1 is proved in affirmative to what relief of service benefits the petitioner is entitled to?

... OPP

3. Whether the petition is not maintainable as alleged?

...OPR-1

4. Whether the petition is bad for non-joinder of necessary party as alleged?

...OPR-1

5. Relief.

7. I have heard the AR for the petitioner and learned counsel for the respondents and have also gone through the record of the case carefully including the written arguments filed on behalf of respondent No. 1.

8. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under.

Issue No. 1 : Decided accordingly.

Issue No. 2 : Entitled to salary *w.e.f.* 20.10.2012 to 21.12.2012.

Issue No. 3 : Yes.

Issue No. 4 : Yes.

Relief : Reference partly answered in favour of the petitioner and against respondents No. 2 & 3 per operative part of award.

REASONS FOR FINDINGS

Issues No. 1 to 4 :

9. Being interlinked and correlated all these issues are taken up together for discussion and decision.

10. In support of his case, the petitioner stepped into the witness box as PW-1 to depose that *vide* appointment letter Ex. P-1, he was appointed as Emergency Medical Technician by the respondent No. 2 on 22.12.2010. He also tendered in evidence the identity card Ex. P-2, wage slip mark A, appreciation letter Ex. P-3, letter dated 17.1.2012 for extension of contract Ex. P-4, termination letter mark B. He further stated that his contract was upto 22.12.2012 but his services were terminated on 20.10.2012 due to his trade union activities as he was the General Secretary of H.P. 108 contract workers union. He also stated that no notice and compensation was given to him before terminating his services. Neither any chargesheet was issued to him nor any enquiry was conducted against him. In cross-examination on behalf of respondent No. 1, he admitted that the appointment letter Ex. P-1 and Identity card Ex. P-2 have been issued by respondent No. 2. He further admitted that his contract was renewed *vide* letter Ex. P-4 by respondents No. 2 & 3. He also admitted that his services were terminated by respondents No. 2 & 3 *vide* letter dated 20.10.2012 mark B. He denied that the respondent No. 1 had no knowledge about the formation of union. He further denied that his conduct and behavior was not proper. He also denied that the respondent No. 1 had no control over the workers and that he was not the employee of respondent

No. 1. When cross-examined on behalf of respondents No. 2 &3, he admitted that the respondents No. 2 & 3 had supplied 555 workers to the respondent No. 1 out of which 535 workers are still working. He further admitted that the attendance register was being maintained by respondent No. 1. He also admitted that the workers were under the control and supervision of respondent No. 1. He admitted that an agreement was entered by respondents No. 2 & 3 with respondent No. 1 for supply of the contract labour which expired on 9.8.2013. He further admitted that his services were terminated by respondent No. 1 and the workers are engaged and terminated by respondent No. 1.

11. On the other hand, the respondent No. 1 examined one Shri Daya Ram, Associate HR of respondent No. 1 company as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as made in the reply filed by respondent No. 1. He also tendered in evidence the copy of authority letter Ex. RW-1/B, memorandum of understanding dated 9.7.2010 Ex. RW-1/C and agreement for service dated 10.8.2010 Ex. RW-1/D. In cross-examination on behalf of respondents No. 2 & 3, he admitted that their company had entered into an agreement dated 10.8.2010 Ex. RW-1/D, with respondent No. 2 *vide* which the respondent No. 2 had recruited 555 workers and supplied to respondent No. 1. He denied that out of them 535 workers are still working with respondent No. 1 but volunteered that out of them 50 workers are working with the respondent No. 1. He admitted that all the workers are under the supervision of respondent No. 1. He further admitted that their company used to disburse the salary to the petitioner. When cross- examined on behalf of petitioner he admitted that the respondent No. 2 had recruited the workers to supply the same to respondent No. 1. He further admitted that those workers have become the workers of respondent No. 1. He denied that the respondent No. 1 used to mark the attendance of the petitioner. He admitted that MOU was executed with the State Government and respondent No. 1 only and there was no reference of respondent No. 2. He further admitted that neither any chargesheet was issued to the petitioner nor any enquiry was conducted against him regarding his alleged misconduct. He also admitted that the log book of the vehicle is maintained by respondent No. 1. He admitted that respondent No. 1 company used to issue identity cards. He further admitted that after the termination of the services of the petitioner 55 new workers were engaged by the respondent No. 1 company directly. He also admitted that *vide* information received under RTI Act Ex. PX, the selection, hiring, appraisal, termination and dismissal of staff is with respondent No. 1.

12. The respondents No. 2 & 3 have examined one Shri Raj Wadhwa Senior Executive Compliances, who stepped into the witness box as RW-2 and tendered in evidence his affidavit Ex. RW-2/A. In cross-examination on behalf of respondent No. 1, he admitted that *vide* agreement dated 10.8.2010 Ex. RW-1/D, the workers were employed on contract basis with respondent No. 1 by respondents No. 2 & 3. He further admitted that appointment letter Ex. P-1 was issued to the petitioner by respondents No. 2 & 3. He also admitted that *vide* Ex. P-4, the contract period of the petitioner was extended by respondents No. 2 & 3. He admitted that the salary and other allowances used to be paid through them. He denied that the respondent No. 1 had no role to play in termination of the petitioner. When cross-examined on behalf of petitioner he admitted that respondents No. 2 & 3 are liable for all the benefits to the workers. He further admitted that the workers were used to be engaged as per the requirement of respondent No. 1. He also admitted that the respondent No. 1 had informed them regarding the termination of petitioner. He admitted that no enquiry was conducted against the petitioner by the respondents No. 2 & 3 prior to his termination. He further admitted that no retrenchment compensation was given to the petitioner and that many juniors to the petitioner are still working with the respondent No. 1.

13. By way of additional evidence, the respondent No. 1 examined RW-3 Shri Daya Ram, Associate (HR) GVK EMRI Dharampur who tendered in evidence the certified copy of certificate of registration under Contract Labour Act mark RY-1. In cross-examination on behalf of

respondent No. 2, he denied that the workers were under the control of respondent No. 1. He further denied that the attendance registers, salary registers, etc., were being maintained by respondent No. 1. He also denied that Adecco (P) Ltd., only used to deploy the labour with respondent No. 1. When cross-examined on behalf of petitioner he denied that the Principal employer is the Director health Services. He further denied that the workers are under the control and supervision of respondent No.1. He admitted that the contract with Adecco has come to an end in the year, 2013.

14. I have closely scrutinized the entire evidence on record, and from the closer scrutiny thereof it has become clear that the respondent No. 1 had signed a memorandum of understanding Ex. RW-1/C with the State of H.P. on 9.7.2010 and as per the same, the respondent No. 1 was allowed to take skilled man power from a third agency. It has also become clear that in pursuance of the aforesaid memorandum of understanding, the respondent No. 1 entered into an agreement dated 10.8.2010 Ex. RW-1/D with respondent No. 2 and as per the same the man power was supplied to the respondent No. 1 by respondent No. 2. From the perusal of letter of appointment Ex. P-1, it has become clear that the same has been issued to the petitioner by the respondent No. 2 on its letter head. The AR for the petitioner contended that since the respondents No. 2 & 3 were not having any licence under section 12 of the Contract Labour (Abolition and Regulation) Act (hereinafter referred to as Contract Labour Act the petitioner would be deemed to be the direct employee of respondent No. 1. At this stage, it would be appropriate to reproduce sections 7 & 12 of the Contract Labour Act.

> 7. Registration of certain establishments.—(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in the prescribed manner for registration of the establishment……
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> 12. Licensing of contractors.—(1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint, no contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer……
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> As per the provisions of Section 7 & 12 of the aforesaid Act, the principal employer *i.e* respondent No. 1 should have a certificate of registration from the prescribed authority and secondly the contractor *i.e* respondent No. 2 should have a licence issued by competent authority i.e the Labour Department. On perusal of the record, it is clear that the principal employer *i.e* respondent No. 1 had the certificate of registration from the prescribed authority mark RY-1. However, the respondents No. 2 & 3 have failed to produce on record any licence issued by the competent authority.

15. Now, the question which arises for consideration before this Court is as to whether the petitioner would be deemed to be direct employee of the respondent No. 1 because his engagement as contract labour was in violation of Section 12 of the Contract Labour Act as on the date of engagement of the petitioner, the respondents No. 2 & 3 were not holding a licence under Section 12 of the Contract Labour Act? This question was considered by the **Hon' ble Supreme Court in AIR 1992 SC 457, titled as Dena Nath & Ors Vs. National Fertilizers Ltd. And others** and it was held as under:

"20……..The Act as can be seen from the scheme of the Act merely regulates the employment of contract labour in certain establishment and provide s for its abolition in certain circumstances. The Act does not provide for total abolition of contract labour but it pro*vide* s for abolition by the appropriate Government in appropriate cases under Section 10 of the Act.

22…….The only consequences provided in the Act where either the principal employer or the labour contractor violates the provision of Sections 9 and 12 respectively is the penal provision, as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act……..."

The aforesaid judgment was considered by the Constitutional Bench of **Hon' ble Supreme Court in Steal Author ity of India Vs. National Union Water Front 2000 (7) SCC-1** in which it was observed as under:

"96. In Dena Naths case (*supra*), a two-Judge Bench of this Court considered the question, whether as a consequence of noncompliance with Sections 7 and 12 of the CLRA Act by the principal employer and the licensee respectively, the contract labour employed by the principal employer would become the employees of the principal employer. Having noticed the observation of the three-Judge Bench of this Court in The Standard-Vacuums case (*supra*) and having pointed out that the guidelines enumerated in sub-section (2) of Section 10 of the Act are practically based on the guidelines given by the Tribunal in the said case, it was held that the only consequence was the penal provisions under Sections 23 and 25 as envisaged under the CLRA Act and that merely because the contractor or the employer had violated any provision of the Act or the Rules, the High Court in proceedings under Article 226 of the Constitution could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. This Court thus resolved the conflict of opinions on the said question among various High Courts. It was further held that neither the Act nor the Rules framed by the Central Government or by any appropriate Government provided that upon abolition of the contract labour, the labourers would be directly absorbed by the principal employer".

16. Hence, the perusal of the aforesaid judgments of the Hon'ble Apex Court shows that the consequence of violation of the Contract Labour Act *i.e* non registration of the establishment under Section 7 and non-possession of the licence under Section 12 of the Act would not result in the absorption of concerned workman by the principal employer rather it would result in prosecution under section 23/25 of the Act. Therefore, in view of the aforesaid legal position, there is no force in the contention of the AR for the petitioner that in view of the fact that respondent No. 2 & 3 were not having any licence under section 12 of the Contract Labour Act, the petitioner would be deemed to be the direct employee of the respondent No. 1.

17. Now the question which arises for consideration before this Court is as to whether the petitioner was the employee of respondent No. 1 or the employee of respondents No. No. 2 & 3. In **(2004) 3 SCC 514, Workmen of Nilgiri Coop. MKT. Society Ltd., Vs. State of T.N and others**, it has been held by the Hon'ble Supreme Court that where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to prove the fact. The relevant portion of the aforesaid judgment is reproduced as under:

"49. In Swapan Das Gupta and Others *Vs.* The First Labour Court of West Bengal and Others [1975 Lab. I.C. 202] it has been held:

"Where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

50. The question whether the relationship between the parties is one of the employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."

18. Therefore, in view of the aforesaid decision of the Hon'ble Supreme Court, the onus was upon the petitioner to prove employer and employee relationship between himself and respondent No. 1. However, no documentary evidence has been produced by the petitioner to show that he was the employee of respondent No. 1. Rather, the petitioner himself pleaded in claim petition that the respondent No. 2 initially appointed him directly as EMT on 22.12.2010 and was deputed with respondent No. 1 for 108 Ambulance service. The respondents No. 2 & 3 also pleaded in their reply to the claim petition that the petitioner was employed as EMT by the respondents No. 2 & 3 and thereafter was deputed with respondent No. 1. It has also been pleaded by respondents No. 2 & 3 that the services of petitioner were taken for a fixed period and the petitioner was selected and employed by respondents No. 2 & 3 on their rolls. The petitioner while appearing in the witness box as PW-1 also deposed before the Court that he was appointed by the respondents No. 2 and 3 on 22.12.2010 *vide* appointment letter Ex. P-1 and thereafter he was deployed with respondent No. 1. In cross-examination he admitted that the appointment letter Ex. P-1 and identity card Ex. P-2 have been issued by the respondents No. 2 & 3. He further admitted that his contract was renewed *vide* letter Ex. P-4 by the respondents No. 2 & 3. It has also been admitted by the petitioner as PW-1 that his services were terminated by the respondents No. 2 & 3 *vide* letter dated 20.10.2012 mark B. Therefore, the aforesaid admission made on the part of the petitioner clearly proves the fact that he was appointed by respondents No. 2 & 3 and his services were also terminated by the respondents No. 2 & 3. RW-1 Daya Ram has specifically stated that the petitioner was never on the pay rolls of respondent No. 1 neither he was ever taken on the pay rolls by respondent No. 1 from the pay rolls of respondent No. 2 and he remained on the pay rolls of respondent No. 2 from the date of his appointment till the date of his termination by respondent No. 2. He further stated that as per the service agreement Ex. RW-1/C, the manpower was deployed by the respondent No. 2 with respondent No. 1 and the petitioner was appointed by the respondent No. 2 and further deputed with respondent No. 1 to provide emergency services. He stated that due to the misconduct on duty by the petitioner, the respondent No. 2 might have terminated the services of the petitioner and the termination of the petitioner has been effected by respondent No. 2 at his own. RW-2 in his affidavit by way of evidence specifically stated that the petitioner was employed as casual temporary employee for a fixed period of employment and his services were terminated by giving statutory notice/letter. He also admitted in cross-examination that the appointment letter Ex. P-1 had been issued to the petitioner by respondents No. 2 & 3 and *vide* letter Ex. P-4, the contract period of petitioner was extended by respondents No. 2 & 3.

19. Furthermore, the perusal of the appointment letter dated 22.12.2010 Ex. P-1 shows that the same had been issued by the respondent No. 2 on its own letter head and the said letter of appointment has been duly accepted by the petitioner by putting his signatures on the same on 24.12.2010. The letter dated 17.1.2012 Ex. P-4 regarding the extension of the contract period has also been issued by respondent No. 2 on its letter head and the same has also been duly accepted by the petitioner by signing the same. The termination letter dated 20.10.2012 Mark B has also been issued by respondents No. 2 on its letter head which shows that the services of the petitioner were terminated by the respondent No. 2. Hence, the aforesaid documents, brought on record,

clearly proves the fact that the petitioner was appointed and terminated by respondents No. 2 & 3 and not by respondent No. 1.

20. The AR for the petitioner contended that since in the identity card Ex. P-2, the name of the respondent No. 1 has been mentioned as such there is relationship of employer and employee between the petitioner and respondent No. 1. However, merely because of the fact that in the identity card Ex. P-2, the name of respondent No. 1 has been mentioned that does not mean that the petitioner was the employee of respondent No. 1. Moreover, the identity card Ex. P-1 has been issued by respondents No. 2 & 3 and this fact has been admitted by petitioner in his cross-examination**. In 2016 (1) Mh. LJ 892, Chanderkala w/o Lalaji Misal and others Vs. Marathwada Medical Research and Rural Development Institution Ltd. and others,** it has been held by the Hon'ble Bombay High Court that the identity cards cannot be indicative of such a relationship since an identity card is not the decisive/determinative piece of evidence of an employer-employee relationship.

21. The AR for the petitioner further contended that since the petitioner was under the direct control and supervision of respondent No. 1, therefore, he would be deemed to be direct employee of respondents No. 1. **In (2009) 13 SCC titled as International Airport Authority of India Vs. International Air Cargo Workers Union and Anr.,** the Hon'ble Supreme Court explained the terms "control" and "supervision" which reads as under:

> "38.The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.
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> 39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."
>
> 53.13…… Merely because the contract labour work is under the supervision of the officers of the principal employer, it cannot be taken as evidence of direct employment under the principal employer.
>
> 54. ……..Exercise of some control over the activities of contract labour while they discharge their duties as labourers, is inevitable and such exercise is not sufficient to hold that the contract labour will become the direct employees of the principle employer."

In Agya Ram Vs. State of HP 2016 (4) LLJ 631, it has been held by our own Hon'ble High Court that the petitioners have to prove by leading evidence to demonstrate that the respondents had the control and supervision over them while discharging official duties. The relevant portion of the aforesaid judgment reads as under:

> "26. Careful perusal of aforesaid law passed by Hon'ble Apex Court clearly suggests that Court while examining the question of employer and employee relationship is required to consider several factors as have been culled hereinabove by the Hon'ble Apex Court. Perusal of facts and circumstances of the case as well as evidence adduced on record, nowhere suggests that petitioners herein were able to prove aforesaid factors while claiming employer and employees relationship between them and respondents No. 2 and 3. As has been discussed in detail, petitioners have not placed on record appointment letters, if any, issued either by respondent No. 2 or respondent No. 3. Since, petitioners herein were unable to prove on record that they were appointed by respondents No. 2 and 3, several other factors as have been indicated hereinabove may not have much relevance as far as present cases are concerned. But otherwise also, perusal of impugned award nowhere suggests that petitioners were able to prove that they were being paid salary/remuneration by respondents herein. Similarly, petitioners have not led on record any evidence to demonstrate that respondents No. 2 and 3 had control and supervision over them while discharging official duties.
>
> (Emphasis supplied)
>
> 27. Hence, in view of the above, this Court finds no force in the contention put-forth on behalf of counsel representing petitioners that Learned Tribunal below has fallen in error while rendering the findings that petitioners do not fall under definition of Section 2(s) of Industrial Disputes Act. Admittedly, in the present case petitioners were not able to prove on record relationship of employees and employer between them and respondents and, as such, it cannot be said that impugned award passed by Learned Tribunal deserves to be quashed and set aside being perverse."

In Manoj Kumar Vs. M/s Sintex Industries Pvt., Ltd., CWP No. 4675 of 2015, decided on 22.3.2016, our own Hon'ble High Court has relied upon the decision of Hon'ble Apex Court in **Balwant Rai Saluja and another Vs. AIR India Limited and others (2014) 9 SCC 407** wherein it has been held as under:

> "65.Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, *inter alia*, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v) whether there is continuity of service; and (vi) extent of control and supervision, *i.e.* whether there exists complete control and supervision. As regards, extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case (*supra*), the International Airport Authority of India case (*supra*) and the NALCO case." (emphasis supplied).

22. Therefore, in view of the aforesaid legal position, the facts in the present case are required to be seen. Though, the petitioner has denied in cross-examination that he was working under the supervision of respondents No. 2 & 3 and his attendance was marked by respondents No. 2 & 3. However, to prove this fact the petitioner has failed to produce any cogent and satisfactory evidence on record. The burden was upon the petitioner to prove by leading cogent and satisfactory evidence on record that he was working under the direct control and supervision of respondent

No. 1. It has been admitted by the petitioner in his cross-examination that an agreement was entered by respondents No. 2 & 3 with respondent No. 1 for the supply of contract labour which expired on 9.8.2013. The petitioner has failed to prove on record that his services were transferred to the rolls of respondent No. 1. On the other hand, RW-1 categorically deposed in his evidence by way of affidavit that the petitioner was never transferred on the roll of respondent No. 1 from the rolls of respondents No. 2 & 3 and he remained on the rolls of respondents No. 2 & 3 from the date of his appointment till the date of his termination, In cross- examination RW-1 has categorically stated that the respondents No. 2 & 3 were providing skilled labour to the respondent No. 1. In cross-examination by the petitioner, RW-1 admitted that the respondent No. 2 had recruited the workers for supplying the same to respondent No. 1. RW-1 denied that they have become the workers of respondent No. 1. He further denied that the attendance of the workers used to be marked by respondent No. 1. He stated that there was supervisory staff of respondent No. 2 for marking the presence of the workers. Moreover, RW-2 in his affidavit by way of evidence specifically stated that the petitioner was employed as casual temporary employee for a fixed period of employment and his services were terminated by giving statutory notice/letter. He admitted in cross-examination that the salary and other allowances used to be paid through them. He also admitted that the letter of termination mark B was issued to the petitioner by respondents No. 2 & 3. Though, RW-2 admitted in cross- examination that the attendance of the workers used to be marked by respondent No. 1 and they were under the control and supervision of respondent No. 1 but no sufficient evidence has been brought on record by the respondents No. 2 & 3 to this effect. Moreover, RW-2 admitted that the respondents No. 2 & 3 are liable for all the benefits to the workers.

23. Therefore, in view of the entire evidence on record led by the parties, it cannot be said that the petitioner was under the direct control and supervision of respondent No. 1. As observed earlier, the appointment letter Ex. P-1 has been issued to the petitioner by respondents No. 2 & 3 and termination letter mark B have also been issued by the respondents No. 2 & 3. The petitioner has failed to prove on record that his services were transferred to the rolls of respondent No. 1. The perusal of the record reveals that the salary was also being paid to the petitioner by respondents No. 2 & 3. Therefore, from the perusal of entire evidence on record it has become clear that the petitioner was working under the control and supervision of respondents No. 2 & 3. Hence, in view of the entire evidence led by the parties, it can be safely held that the petitioner was not the employee of respondent No. 1 rather he was the employee of respondents No. 2 & 3. Therefore, it can safely be held that the petition is bad for non-joinder of respondent No. 1 and the same is not maintainable against respondent No. 1.

24. The AR for the petitioner next contended that the services of the petitioner had been terminated illegally without serving him any notice as required under Section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondents and fresh workers have been engaged in violation of the provisions of Section 25-G and 25-H of the Act. The perusal of the appointment letter dated 22.12.2010 Ex. P-1 shows that the petitioner was initially appointed for a period of 12 months from 22.12.2010 to 21.12.2011 and his contract was further extended *vide* letter dated 17.1.2012 for another one year *w.e.f.* 22.12.2011. The conjoint reading of both the aforesaid letters Ex. P-1 and Ex. P-4 categorically stipulates that the appointment of the petitioner with the respondents No. 2 & 3 was purely contractual for a fixed period. The terms of both the aforesaid letters *i.e* appointment letter Ex. P-1 as well as the letter extending the contract Ex. P-4 have been duly accepted by the petitioner by appending his signatures on the same. Therefore, it can safely be held that the petitioner was fully aware about the terms of his employment which he accepted without any demur. The petitioner was aware that his employment was contractual and would come to an end on 21.12.2012. Since, the appointment of the petitioner was contractual for a fixed period as such his termination *w.e.f.* 20.10.2012 cannot be termed as retrenchment within

the meaning of section 2(oo) of the Act and his case falls within the exception as prescribed under Section 2(oo)(bb) of the Act. **In AIR 2007, SC 631, M.D Karnatka Handloom Dev. Corporation Ltd. Vs. Mahadeva Laxman Raval,** the respondent was engaged on contract basis and in the appointment letters issued by the petitioners, the respondent's appointment with the corporation was purely contractual for a fixed period and soon after the expiry of specified period, the respondent's services were discontinued. The Hon'ble Supreme Court had clearly held that the termination of his contract does not amount to retrenchment and therefore it does not attract section 25-F of the Act at all. The relevant portion of the aforesaid judgment reads as under:

> "18. We have perused all the appointment letters dated 14.01.1991, 24.02.1992, 10.02.1993, 03.03.1993 and 30.11.1993 produced by the respondent as annexures which consistently and categorically state that the respondent's appointment with the Corporation was purely contractual for a fixed period. The respondent was engaged only under the Vishwa Programme Scheme which is not in existence. Now the scheme came to an end during August, 1994 the respondent was also not governed by any service rules of the Corporation. The Corporation put an end to the contract *w.e.f.* 31.08.1993 which, in our opinion, cannot be termed as dismissal from service. Even assuming that the respondent had worked 240 days continuously he, in our opinion, cannot claim that his services should be continued because the number of 240 days does not apply to the respondent inasmuch as his services were purely contractual. The termination of his contract, in our view, does not amount to retrenchment and, therefore, it does not attract compliance of Section 25 F of the I.D. Act at all".

In the present case also, since the petitioner was engaged for a specific period, the termination of the petitioner would not amount to retrenchment within the meaning of Section 2(oo) of the Act and his case falls within the exception as prescribed under section 2(oo)(bb) of the Act and therefore the compliance of Sections 25-F, 25-G and 25-H of the Act by the respondents No. 2 & 3 was not necessary at all.

25. The AR for the petitioner lastly contended that since the contract of the petitioner was extended for a period of one year *w.e.f.* 22.12.2011, his services could not have been terminated before the expiry of the contract period *i.e* 21.12.2012. In the letter of extension of contract Ex. P-4, it has been clearly stipulated that all the other terms and conditions of the employment shall remain the same as mentioned in the appointment letter dated 22.12.2010 Ex. P-1. As per clause-4 of the appointment letter Ex. P-1, the contract was terminable by either party giving 15 days notice in writing or salary in lieu of the notice to the other party. However, the perusal of record reveals that the services for the petitioner were terminated on 20.10.2012 and while terminating the services of the petitioner, the respondents No. 2 & 3 have failed to give 15 days' notice in writing or salary in lieu of notice to the petitioner. Thus, the termination of the contract of employment of the petitioner by the respondents No. 2 &3 before the expiry of the stipulated duration amounted to breach of terms of the contract. Hence, the termination of the services of the petitioner *w.e.f.* 20.10.2012 by the respondents No. 2 &3 before the expiry of the stipulated period is illegal and unjustified. Now, the question which arises for consideration before this Court as to what relief/service benefits the petitioner is entitled to. In **S.S. Shetty Vs. Bharat Nidhi Ltd., 1958 SCR 442,** the Hon'ble Supreme Court observed as under :

> "If the contract of employment is for a specific term, the servant would in that event be entitled to damages the amount of which would be measured *primafacie* and subject to rule of mitigation in the salary of which the master had deprived him. (*vide* Collier V. Surday Reference Publishing Co. Ltd., [1940] 4 All E.R 2371). The servant would then be entitled to the whole of the salary, benefits etc., which he would have earned had he continued in the

employment of the master for the full term of the contract, subject of course to mitigation of damages by way of seeking alternative employment.

Therefore, in view of the aforesaid judgment of the Hon'ble Apex Court and also in view of the facts and circumstances of the present case, this Court is of the considered view that the petitioner is entitled to the salary upto the period he was entitled to remain in service *i.e* with effect from the date of his termination *i.e* 20.10.2012 till the date of the expiry of the contract *i.e* 21.12.2012. All the aforesaid issues are decided accordingly.

Relief :

As a sequel to my above discussion and findings on issues No. 1 to 4, the claim of the petitioner succeeds and is hereby partly allowed with the result the respondents No. 2 & 3 are directed to pay the salary for the period *w.e.f.* 20.10.2012 to 21.12.2012 to petitioner within a period of three months from today failing which the same shall carry interest @ 9% per annum from the date of award till its realization. The reference is answered accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 9th Day of Jan., 2018.

Sd/-
(SUSHIL KUKREJA),
Presiding Judge,
Industrial Tribunal-cum-Labour Court, Shimla.

IN THE COURT OF SH. SUSHIL KUKREJA, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM**-LABOUR COURT, SHIMLA**

Ref No. 52 of 2014
Instituted on 30.7.2014
Decided on 9.1.2018

Prem Singh s/o Shri Hasri Ram c/o Atma Ram, r/o Dhani Ram Building, New Sabzi Mandi Nerwa, Chopal, District Shimla, H.P.

..Petitioners.

VS.

1. M/s GVK Emergency Management Research Institute, NH-22, Kumarhatti, Bye Pass near J.P Motor, Village Samlesh, P.O Barog, District Solan, H.P.

2. Adecco India Pvt., Ltd., C-127 Basement Level, Satguru Infotech, Phase-VIII, Industrial Area Mohali-160071.

..Respondents.

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri R.K Khidtta, Advocate
For respondent No. 1 : Shri Rajat Sahotra, Advocate
For respondent No. 2 : Shri C.M Sharma, Advocate

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"Whether the termination of services of Shri Prem Singh Manglate s/o Shri Hari Ram, c/o Atma Ram Dhani Ram Building, New Subzi Mandi, Nerwa, Chopal, District Shimla, H.P., who was employed as Driver during year, 2010 by the employer (i) GVK Emergency Management Research Institute, NH-22, Kumarhatti, Bye-Pass Near J.P. Motor, Village Samlesh, P.O. Barog, District Solan, H.P. (work office) employed through M/s Adecco India Private Limited, C-127 Basement Level, Satguru Infotech, Phase-VIII, Industrial Area, Mohali-160017 (Area Office) *w.e.f.* 13.6.2013 without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits the above Ex-driver is entitled to from the above employer?"

2. In nutshell, the case of the petitioner is that he was engaged as pilot/driver by the respondents *w.e.f.* 23.12.2010 and worked as such in Tehsil Chopal area till 13.6.2013 continuously and he also completed special training regarding which certificate was issued to him and that due to some ill will, he was transferred from Nerwa location to Theog location *vide* letter dated 27.11.2012 which was far away from the house of the petitioner and his wife was under treatment for long time and was residing at Nerwa in a rented accommodation and as such due to family problem, he requested the respondent for his adjustment in Nerwa location and *w.e.f.* 13.6.2013, the services of the petitioner were terminated without considering his genuine family problem and that too without serving any notice and retrenchment compensation and without conducting any enquiry and without following the provisions of the Industrial Disputes Act, 1947 (hereinafter referred to as Act). It is further stated that the petitioner had completed 240 days in each calendar year and the respondents used to pay the salary of ₹ 5704/- only in place of ₹ 8000/- and even no over time was paid to him as the respondents used to take the work from the petitioner for more than 12 hours and some times for 24 hours in a day. That the petitioner requested the respondents for his reengagement but of no avail and then he filed the demand notice and due to adamant attitude of the respondents the conciliation proceedings failed and the matter was referred to this Court. It is also stated that the junior persons to the petitioner are working with the respondents in violation of the provisions of "last come first go" and that the work which the petitioner was performing is still available with the respondents and that the petitioner is a workman as defined in the Act as he used to work manually with the respondents and while terminating the services of the petitioner, the respondents have violated the provisions of sections 25-F, 25-G and 25-H of the Act. Against this back-drop a prayer has been made that the termination order of the petitioner *w.e.f.* 13.6.2013 be quashed and set aside and the respondents be directed to reinstate the petitioner in service on the same post with all consequential service benefits including back- wages.

3. By filing separate reply, the respondent No. 1 contested the claim of the petitioner wherein preliminary objections have been taken regarding maintainability, that there exists no cause of action in favour of the petitioner, *locus standi* and that the claim petition is bad for non joinder of necessary party. On merits, it has been denied that the petitioner was on the rolls of the respondent No. 2. It is admitted that the employers are working in the project for the State of Himachal Pradesh under NRHM and as such the department of Health Services of Himachal

Pradesh is providing service to the people through the said employers. It is asserted that respondent No. 1 employed various skilled workers such as pharmacist, drivers and other requisite supporting staff on contract basis as per the memorandum of understanding between the State of H.P and the management of the respondent No. 1 and the skilled workers were not directly employed by respondent No. 1 but were supplied by respondent No. 2 and they are on the rolls of respondent No. 2 under the Contract Labour Act. It is denied that the petitioner was deputed on the rolls with respondent No. 1 by respondent No. 2. It is asserted that the on the request of the petitioner, he was allowed to transfer at Theog through respondent No. 2 and to render his services at his will at Theog. It is denied that the respondent No. 1 terminated the services of the petitioner without considering his genuine problem *w.e.f* 13.6.2013. It is asserted that the petitioner had left the job on his own will by remaining absent from his duties for several days without any prior intimation or approval of the leaves from the respondent No. 1 and respondent No. 2. That he was negligent in serving his duties in service and was also found creating mischief in the other employees and also misbehaved with the clients and customers when he used to drop them in the hospital and from the hospital to their homes. It is denied that the petitioner had completed 240 days in each calendar year. Since the petitioner was on the rolls of respondent No. 2, hence, the respondent No. 1 is not responsible for his termination. The respondent No. 1 prayed for the dismissal of the claim petition.

4. Respondent No. 2 also filed separate reply wherein various preliminary objections have been taken that the respondent No. 2 being a registered company under the Companies Act, 1956 engaged in the business of providing services in the area of Human resource Management and Consultancy Servicing etc., to various organization/clients and as such respondent No. 2 entered into an agreement with respondent No. 1 on 10.8.2010 and pro*vide* d its service to engage the petitioner alongwith 555 other workers to provide 108 Emergency Response Services and Pre-Hospital Care in the State of Himachal Pradesh in partnership with Government of HP and both the respondents have mutually decided to engage the services, otherwise the respondent No. 2 had no independent authority to re-instate the petitioner and regularize his services and even his services have been terminated as per the decision of respondent No. 1, that as per agreement for services, executed between respondents, the same was valid upto 9.8.2013 and thereafter the respondent No. 1 refused to renew this agreement, hence, respondent No. 2 is unable to re-instate the petitioner. On merits, it has been asserted that the transfer orders of the petitioner were issued only as per the requirement of respondent No. 1 and the services of the petitioner were engaged with respondent No. 1 through respondent No. 2. The respondent No. 2 prayed for the dismissal of the claim petition.

5. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondents.

6. On the pleadings of the parties, the following issues were framed on 19.1.2016.

1. Whether the termination of the services of the petitioner *w.e.f.* 13.6.2013 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged?

..OPP

2. If issue No. 1 is proved in affirmative to what relief of service benefits the petitioner is entitled to?

..OPP

3. Whether the petition is not maintainable as alleged? *..OPR*

4. Whether the petition is bad for nonjoinder of necessary party as alleged?

..OPR

5. Relief.

7. I have heard the learned counsel for the parties and have also gone through the record of the case carefully including the written arguments filed on behalf of petitioner and respondent No. 1.

8. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under:

Issue No. 1	Decided accordingly
Issue No. 2	Entitled to lump sum compensation of ` 50,000/- (` Fifty Thousand only)
Issue No. 3	Decided accordingly
Issue No. 4	Yes
Relief	Reference partly answered in favour of the petitioner and against respondent No. 2 per operative part of award.

REASONS FOR FINDINGS

Issues No. 1 and 4:

9. Being interlinked and correlated, both these issues are taken up together for discussion and decision.

10. The learned counsel for the petitioner contended that the petitioner was engaged as Driver by the respondents and he worked continuously *w.e.f.* 23.12.2010 till 13.6.2013 on which date his services were orally terminated without following the mandatory provisions of the Act as such the petitioner is entitled to be reinstated in service by the respondents on the same post with all service benefits including full back-wages.

11. On the other hand learned counsel for the respondent No. 1 contended that the petitioner was not its employee and there is no relationship of employee and employer between the petitioner and respondent No. 1. He further contended that the petitioner was the employee of respondent No. 2 and was deployed with respondent No. 1 under the Contract Labour (Regulation and Abolition) Act, 1970 and his services were never terminated by the respondent No. 1 as such the respondent No. 1 is not liable to reinstate the petitioner in service.

12. The learned counsel for the respondent No. 2 contended that the respondent No. 2 is engaged in the business of providing services in the area of Human resource Management and Consultancy Servicing etc., to various organizations and it had entered into an agreement with respondent No. 1 and provided its service to respondent No. 1 by engaging the petitioner along-with 555 other workers. He further contended that the services of the petitioner were terminated as per the decision of respondent No. 1 and respondent No. 2 had no independent authority to reinstate the petitioner.

13. To prove issue No. 1, the petitioner stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reiterated almost all the averments as made in the

claim petition. He also tendered in evidence the copy of appointment letter Ex. PW-1/B, copy of appreciation certificate Ex. PW-1/C, copy of salary statement Ex. PW-1/D, copy of appreciation letter issued by Shri Mehul Sukumaran Ex. PW-1/E, discharge slips mark PX and mark PX-1, prescription slips mark PX-2, to mark PX-4, letter written by him to HR Head Ex. PW-1/F and copy of identity card Ex. PW-1/G. In cross- examination on behalf of respondent No. 1, he denied that his interview was conducted by respondent No. 2. He admitted that letter of appointment Ex. PW-1/B was issued by respondent No. 2. He denied that he was working under the control of respondent No. 2. He further denied that he had given request letter for his transfer to respondent No. 2. He also denied that after his transfer to Theog, he had not joined his duties. He denied that he left the job at his own. When cross- examined on behalf of respondent No. 2, he admitted that he had also signed the letter Ex. PW-1/B. He further admitted that appreciation letter Ex. PW-1/C had been issued by respondent No. 1. He denied that he was under the control of respondent No. 1. He further denied that his services had been terminated by respondent No. 1 but volunteered that both the respondents have terminated his services.

14. On the other hand, the respondent No. 1 examined one Shri Daya Ram, Associate HR with respondent No. 1 as RW-1 who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as made in the reply. He also tendered in evidence authority letter Ex. RW-1/B, memorandum of understanding dated 9.7.2010 Ex. RW-1/C and agreement of service Ex. RW-1/D. In cross-examination on behalf of respondent No. 2, he admitted that respondent No. 2 is engaged in the business of providing services in the area of Human Resource Management and Consultancy Service to various organization/clients. He further admitted that *vide* agreement Ex. RW-1/D dated 10.8.2010, their company entered into an agreement with the respondent No. 2 *vide* which the respondent No. 2 had recruited 555 workers and supplied to respondent No. 1 and out of them 50 workers are still working with respondent No. 1. He also admitted that all the workers are under the supervision of respondent No. 1. He denied that the services of the petitioner were terminated on the decision taken by respondent No. 1. When cross-examined on behalf of petitioner he admitted that the respondent No. 1 had taken the work of National Rural Health Mission from the state of H.P. *w.e.f.* the year, 2010 for which an MOU had also been executed as per which all the recruitments, promotions, actions and supervision of the workers was to be done by respondent No. 1 and the National Rural Health Mission is still going on. He denied that the petitioner was recruited by respondent No. 1 under NHRM. He admitted that he had worked under respondent No. 1 from 23.12.2010 till 13.6.2013 at Chopal and Nerwa location. He denied that on 27.11.2012, the petitioner was transferred from Chopal to Theog by respondent No. 1 and that his services were terminated by respondent No. 1 orally on 13.6.2013. It is correct that no letter/notice was issued to the petitioner for resumption of his duties. He denied that the vehicles are owned by the respondent No. 1. He admitted that record and log book of the vehicles are maintained by respondent No. 1. He further admitted that they have not issued any letter to any authority or respondent No. 2 regarding the alleged absenteeism of petitioner. He denied that the petitioner was being paid the salary of ₹ 5704/- per month. He admitted that the services of respondent No. 1 are available 24 hours and that the vehicle *i.e* 108 Ambulance was handed over to the petitioner for Nerwa Chopal location and they have not received any complaint from Nerwa Chopal location regarding the non-availability of 108 ambulance at any time. He also admitted that after the termination of the petitioner, the respondent No. 1 had recruited 55 new workers and they have not issued any letter to the petitioner before engaging new persons.

15. RW-2 Shri Raj Wadhwa appeared into the witness box on behalf of respondent No. 2 and tendered his affidavit Ex. RW-2/A wherein he reiterated almost all the averments stated in the reply. In cross-examination on behalf of respondent No. 1 he admitted that a contract Ex. RW-1/D was entered between GVK and Adecco for supplying the man power and the persons were engaged by their company on the basis of requirement of GVK. He denied that the attendance of the workers used to be marked by them but admitted that the salary of the workers used to be paid by them after

deducting EPF and ESI. He denied that their company was informed by GVK regarding the misconduct of the petitioner. The services of the petitioner were terminated by them on the recommendations of GVK. When cross-examined on behalf of petitioner he admitted that the petitioner was engaged as driver on 23.12.2010 and he worked till 13.6.2013 continuously and that he was posted at Nerwa Chopal location. He admitted that the petitioner was transferred to Theog on 27.12.2012 but volunteered that he was transferred by GVK. He denied that the petitioner was illegally terminated by them on 13.6.2013 but volunteered that GVK had requested them to remove the petitioner immediately from service. He admitted that neither any notice was issued to the petitioner nor any compensation was paid to him and enquiry was also not held by them prior to the termination of the services of the petitioner. He further admitted that the petitioner had completed 240 days in each calendar year. He stated that the gross salary of the petitioner was ` 6400/- per month and he was being paid ` 5704/- per month. He also admitted that the project of 108 ambulance service is still going on in the State of H.P. and that their company is providing the service even today. He denied that they have engaged fresh persons. He admitted that the petitioner had worked for 12 to 18 hours in a day during his service.

16. By way of additional evidence, the respondent No. 1 examined RW-3 Shri Daya Ram, Associate (HR) GVK EMRI Dharampur who tendered in evidence the certified copy of certificate of registration under Contract Labour Act mark RY-1. In cross-examination on behalf of respondent No. 2, he denied that the workers were under the control of respondent No. 1. He further denied that the attendance registers, salary registers, *etc.,* were being maintained by respondent No. 1. He also denied that Adecco (P) Ltd., only used to deploy the labour with respondent No. 1. When cross-examined on behalf of petitioner he admitted that their company is still providing service. He further denied that the workers are under the control and supervision of respondent No. 1. He admitted that the contract with Adecco has come to an end in the year, 2013.

17. I have closely scrutinized the entire evidence on record, and from the closer scrutiny thereof it has become clear that the respondent No. 1 had signed a memorandum of understanding Ex. RW-1/C with the State of H.P. on 9.7.2010 and as per the same, the respondent No. 1 was allowed to take skilled man power from a third agency. It has also become clear that in pursuance of the aforesaid memorandum of understanding, the respondent No. 1 entered into an agreement dated 10.8.2010 Ex. RW-1/D with respondent No. 2 and as per the same the man power was supplied to the respondent No. 1 by respondent No. 2.

18. Now, the question which arises for consideration before this Court is as to whether the petitioner was the employee of respondent No. 1 or the employee of respondent No. 2. In (**2004) 3 SCC 514, Workmen of Nilgiri Coop. MKT. Society Ltd., Vs. State of T.N and others,** it has been held by the Hon'ble Supreme Court that where a person asserts that he was a workman of the Company, and it is denied by the Company, it is for him to prove the fact. The relevant portion of the aforesaid judgment is reproduced as under:

> "49. In Swapan Das Gupta and Others Vs. The First Labour Court of West Bengal and Others [1975 Lab. I.C. 202] it has been held:
>
> "Where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."
>
> 50. The question whether the relationship between the parties is one of the employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."

19. Therefore, in view of the aforesaid decision of the Hon'ble Supreme Court, the onus was upon the petitioner to prove employer and employee relationship between himself and respondent No. 1. However, no documentary evidence has been produced by the petitioner to show that he was the employee of respondent No. 1. Rather, the petitioner himself tendered in evidence the letter of appointment Ex. PW-1/B which shows that the respondent No. 2 initially appointed him directly as Driver on 23.12.2010. The respondent No. 2 also pleaded in its reply to the claim petition that the services of the petitioner were engaged for respondent No. 1 through respondent No. 2. It has further been pleaded by the respondent No. 2 that the services of the petitioner were terminated as per the decision of respondent No. 1 and the transfer order of the petitioner was issued as per the requirement of respondent No. 1. The petitioner while appearing in the witness box as PW-1 also admitted in cross-examination that the appointment letter Ex. PW-1/B has been issued by the respondent No. 2. Therefore, the aforesaid admission made on the part of the petitioner clearly proves the fact that he was appointed by respondent No. 2. The salary statement Ex. PW-1/D clearly shows that the salary to the petitioner was being disbursed by the respondent No. 2. RW-1 Daya Ram has specifically stated that the petitioner was never on the pay rolls of respondent No. 1 neither he was ever taken on the pay rolls by respondent No. 1 from the pay rolls of respondent No. 2 and he remained on the pay rolls of respondent No. 2 from the date of his appointment till the date of his termination by respondent No. 2. He further stated that as per the service agreement Ex. RW-1/C, the manpower was deployed by the respondent No. 2 with respondent No. 1 and the petitioner was appointed by the respondent No. 2 and further deputed with respondent No. 1 to provide emergency services. He stated that due to the misconduct on duty by the petitioner, the respondent No. 2 might have terminated the services of the petitioner and the termination of the petitioner has been effected by respondent No. 2 at his own. RW-2 in his affidavit by way of evidence specifically stated that the petitioner was employed as casual temporary employee for a fixed period of employment and his services were terminated by giving statutory notice/letter. He also admitted in cross-examination that the salary to the workers was being paid by them. He further admitted that the salary to the workers was being paid after deducting the payment of EPF and ESI. He also admitted in cross- examination that the petitioner was transferred to Theog on 27.11.2012. He admitted that the respondent No. 1 GVK has requested them to remove the petitioner immediately from service.

20. Furthermore, the perusal of the appointment letter dated 22.12.2010 Ex. PW-1/B shows that the same had been issued by the respondent No. 2 on its own letter head and the said letter of appointment has been duly accepted by the petitioner by putting his signatures on the same. Hence, the entire evidence brought on record, clearly proves the fact that the petitioner was appointed, transferred and terminated by respondent No. 2 and not by respondent No. 1.

21. The learned counsel for the petitioner contended that since in the identity card Ex. PW-1/G, the name of the respondent No. 1 has been mentioned as such there is a relationship of employer and employee between the petitioner and respondent No. 1. However, merely because of the fact that in the identity card Ex. PW-1/G, the name of respondent No. 1 has been mentioned that does not mean that the petitioner was the employee of respondent No. 1. **In 2016 (1) Mh. LJ 892, Chanderkala w/o Lalaji Misal and others Vs. Marathwada Medical Research and Rural Development Institution Ltd. and others,** it has been held by the Hon'ble Bombay High Court that the identity cards cannot be indicative of such a relationship since an identity card is not the decisive/determinative piece of evidence of an employer-employee relationship.

22. The learned counsel for the petitioner further contended that since the petitioner was under the direct control and supervision of respondent No. 1, therefore, he would be deemed to be direct employee of respondents No. 1. **In (2009) 13 SCC titled as International Airport Authority of India Vs. International Air Cargo Workers Union and Anr.,** the Hon'ble Supreme Court explained the terms "control" and "supervision" which reads as under:

"38.The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

53.13…… Merely because the contract labour work is under the supervision of the officers of the principal employer, it cannot be taken as e*vide* nce of direct employment under the principal employer.

54. ……..Exercise of some control over the activities of contract labour while they discharge their duties as labourers, is inevitable and such exercise is not sufficient to hold that the contract labour will become the direct employees of the principle employer." **In Agya Ram Vs. State of HP 2016 (4) LLJ 631, it has been held by our own Hon'ble High Court** that the petitioners have to prove by leading evidence to demonstrate that the respondents had the control and supervision over them while discharging official duties. The relevant portion of the aforesaid judgment reads as under:

"26. Careful perusal of aforesaid law passed by Hon'ble Apex Court clearly suggests that Court while examining the question of employer and employee relationship is required to consider several factors as have been culled hereinabove by the Hon'ble Apex Court. Perusal of facts and circumstances of the case as well as evidence adduced on record, nowhere suggests that petitioners herein were able to prove aforesaid factors while claiming employer and employees relationship between them and respondents No. 2 and 3. As has been discussed in detail, petitioners have not placed on record appointment letters, if any, issued either by respondent No. 2 or respondent No. 3. Since, petitioners herein were unable to prove on record that they were appointed by respondents No. 2 and 3, several other factors as have been indicated hereinabove may not have much relevance as far as present cases are concerned. But otherwise also, perusal of impugned award nowhere suggests that petitioners were able to prove that they were being paid salary/remuneration by respondents herein. Similarly, petitioners have not led on record any evidence to demonstrate that respondents No. 2 and 3 had control and supervision over them while discharging official duties.

(Emphasis supplied)

27. Hence, in view of the above, this Court finds no force in the contention put-forth on behalf of counsel representing petitioners that learned Tribunal below has fallen in error while rendering the findings that petitioners do not fall under definition of Section 2(s) of

Industrial Disputes Act. Admittedly, in the present case petitioners were not able to prove on record relationship of employees and employer between them and respondents and, as such, it cannot be said that impugned award passed by learned Tribunal deserves to be quashed and set aside being perverse."

In Manoj Kumar Vs. M/s Sintex Industries Pvt., Ltd., CWP No. 4675 of 2015, decided on 22.3.2016, our own Hon'ble High Court has relied upon the decision of Hon'ble Apex Court in **Balwant Rai Saluja and another Vs. AIR India Limited and others (2014) 9 SCC 407** wherein it has been held as under:

"65.Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, *inter alia*, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v) whether there is continuity of service; and (vi) extent of control and supervision, *i.e.* whether there exists complete control and supervision. As regards, extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case (*supra*), the International Airport Authority of India case (*supra*) and the NALCO case." (emphasis supplied).

23. Therefore, in view of the aforesaid legal position, the facts in the present case are required to be seen. Though, the petitioner has denied in cross-examination that he was working under the control of respondent No. 2. However, to prove this fact the petitioner has failed to produce any cogent and satisfactory evidence on record. The burden was upon the petitioner to prove by leading cogent and satisfactory evidence on record that he was not working under the direct control and supervision of respondent No. 2. On the other hand, RW-1 categorically deposed in his evidence by way of affidavit that the petitioner was never taken on the payrolls of respondent No. 1 from the payrolls of respondent No. 2 and he remained on the payrolls of respondent No. 2 from the date of his appointment till the date of his termination. In cross-examination, RW-1 categorically admitted that the respondent No. 2 was engaged in the business of providing service in the area of Human Resource Management and Consultancy service to various organizations/clients. He further admitted that their company had entered into an agreement dated 10.8.2010 Ex. RW-1/D, with the respondent No. 2 *vide* which the respondent No. 2 had recruited 555 workers and supplied to the respondent No. 1. He denied that out of them 535 workers are still working with the respondent No. 1. Moreover, RW-2 in his affidavit by way of evidence specifically stated that the petitioner was employed as casual temporary employee for a fixed period of employment and his services were terminated by giving statutory notice/letter. He admitted in cross-examination that the salary and other allowances to the workers was being paid by them. He further admitted that the salary to the workers was being paid after deducting the payment of EPF and ESI. He also admitted n cross-examination that the petitioner was transferred to Theog on 27.11.2012. He admitted that GVK has requested them to remove the petitioner immediately from service.

24. Therefore, in view of the entire evidence on record led by the parties, it cannot be said that the petitioner was under the direct control and supervision of respondent No. 1. As observed earlier, the appointment letter Ex. PW-1/B has been issued to the petitioner by respondent No. 2 and the petitioner was transferred by respondent No. 2 and his services were also terminated by respondent No. 2. The perusal of the record further reveals that the salary was also being paid to the petitioner by respondent No. 2. Therefore, from the perusal of entire evidence on record it has become clear that the petitioner was working under the control and supervision of respondent No. 2. Hence, in view of the entire evidence led by the parties, it can be safely held that the petitioner was not the employee of respondent No. 1 rather he was the employee of respondent No. 2.

Therefore, it can safely be held that the petition is bad for non-joinder of respondent No. 1 and the same is not maintainable against respondent No. 1.

25. Though, the case of the respondent No. 1 is that the petitioner was negligent in serving his duties in service and was also found creating mischief with the other employees and also misbehaved with the client's and customers when he used to drop them to the hospital and from the hospital to their home and as such the petitioner has committed misconduct which was conveyed to the respondent No. 2 by respondent No. 1 many times. However, to prove the aforesaid misconduct against the petitioner no evidence was led by the respondent No. 1. Therefore, in the absence of any evidence on record, it cannot be said that the petitioner was guilty of misconduct while discharging his duties.

26. The further case of the respondent No. 1 is that the petitioner had left the job at his own by remaining absent from his duties for several days without any intimation or approval of the leaves. However, there is no iota of evidence on record which could go to show that the petitioner had left the job at his own as no notice or letter regarding abandonment of the job by the petitioner is placed on record by the respondents. Therefore, in the absence of any evidence on record, inference cannot be drawn that the petitioner had abandoned the job. Reliance is placed on decision reported in AIR 1979 **SC 582 case titled as G.T Lad and others Vs. Chemicals and Fibers India** Ltd. where it has been held that:

> "From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. v. Venkatiah (1964) 4 SC R 265: (AIR 1964 SC 1272), it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."
>
> Since, in the present case also no evidence has been placed on record by the respondents that the petitioner has abandoned the job with an intention not to resume the same, it cannot be said that the petitioner had left the job at his own.

27. The learned counsel for the petitioner next contended that the services of the petitioner had been terminated illegally without serving him any notice as required under Section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondents and fresh workers have been engaged in violation of the provisions of Section 25-G and 25-H of the Act. On the other hand, the learned counsel for respondent No. 2 contended that the services of the petitioner were engaged for a fixed period of employment *vide* appointment letter Ex. PW-1/B and therefore, the termination of the services of the petitioner does not fall within the scope of the terms "retrenchment" under section 2(oo) of the Act. The perusal of the record reveals that even though in the letter of appointment Ex. PW-1/B, the terms of appointment had been fixed for 12 months *i.e w.e.f.* 23.12.2010 to 23.12.2011 but after 23.12.2011, no order extending the terms of the appointment of the petitioner has been placed on record by respondent No. 2. RW-2 admitted in cross-examination that the petitioner was engaged on 23.12.2010, transferred to Theog on 27.11.2012 and he worked till 13.6.2013 continuously. Therefore, the onus was upon the respondent No. 2. to prove that after 23.12.2011, the terms of the appointment of the petitioner had

been extended by way of contract. However, no such order or contract has been placed on record by the respondent No. 2. No doubt, initially the petitioner was appointed for a fixed term of 12 months, however, after the expiry of 12 months also the petitioner continued in service. The respondent No. 2 had not discontinued his services *w.e.f* 23.12.2011. As observed earlier, no order extending the term of appointment or fixing the further terms of appointment has been placed on record by the respondent No. 2. Therefore, it can be safely held that no limitation was fixed regarding the period of employment of petitioner after 23.12.2011. That being the position, it is not possible to uphold the contention of the learned counsel for the respondent No. 2 that the termination of the services of the petitioner does not fall within the scope of retrenchment under Section 2(oo) of the Act.

28. Admittedly, the respondent No. 2 has entered into an agreement Ex. RW-1/D with the respondent No. 1 on 10.8.2010 and pro*vide* d its services to engage the petitioner along-with about 555 other workers. RW-1 also admitted in cross-examination that the respondent No. 2 had recruited 555 workers and supplied them to respondent No. 1. It has also been admitted by RW-2 in cross- examination that the petitioner had worked continuously *w.e.f.* 23.12.2011 till 13.6.2013 and he had completed more than 240 days in each calendar year. Thus, it has been proved on record that the petitioner had completed 240 days in twelve calendar months preceding his termination. Since, the respondent No. 2 had engaged more than 100 workers as such the provisions of Chapter-V-B of the Act would apply in the present case. Therefore, it was incumbent upon the respondent No. 2 to have complied with the provisions of Section 25-N of the Act before terminating the services of the petitioner. The provisions of Section 25-N of the Act lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) & (b) which are mandatory in nature. Section 25-N of the Act reads as under:

Conditions precedent to retrenchment of workmen.-

(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

However, in the present case, the perusal of the record shows that the respondent No. 2 has not complied with the conditions of Section 25-N as enumerated in clause (a) & (b), precedent to the retrenchment of petitioner which are mandatory in nature as such the termination of the services of the petitioner by the respondent No. 2 was illegal and unjustified.

29. Therefore, in view of my forgoing discussion, I have no hesitation in holding that the services of the petitioner were terminated illegally without complying with the provisions of Section 25-N of the Industrial Disputes Act, 1947. Hence, both these issues are decided accordingly.

Issue No. 2:

30. Since, I have held under issue No. 1 above that the termination of services of the petitioner by the respondent No. 2 without complying with the provisions of Section 25-N of the Act is illegal and unjustified. Therefore, the question which arises before this Court as to what service benefits the petitioner is entitled. From the perusal of record, it has become clear that the contract between the respondent No. 1 & respondent No. 2 expired on 9.8.2013 and thereafter the contract was not renewed. RW-2, admitted in cross-examination that now they are not providing the service in the project of 108 Ambulance. It is by now well settled that if the termination of employee is found to be illegal, the relief by way of reinstatement with back-wages is not automatic. The Hon'ble Supreme Court in **Santosh Kumar Seal and others reported in 2010 LLR 677: 2010 III CLR 17 SC**, has held that relief by way of reinstatement with back wages is not automatic even if of an employee is found to be illegal or is in contravention of the prescribed procedure and that mandatory compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate.

31. **In Jagbir Singh Vs. Haryana State Agricultural Marketing Board (2009) 15 SCC 327, the Hon'ble Supreme Court** has held that:

> "It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice. "

32. In the present case, even though the termination of the petitioner is held to be illegal but his reinstatement would not be appropriate relief as the contract between the respondent No. 1 and respondent No. 2 expired on 9.8.2013 and the respondent No. 2 is not providing service in the Project wherein the petitioner was engaged. Therefore, in such a situation it would not be appropriate to make the order for reinstatement of the petitioner in the present case. Hence, taking into account all the facts and circumstances of the case, the ends of justice would be met, if the lump sum compensation is awarded to the petitioner. Therefore, in my view the petitioner is entitled to receive a suitable, appropriate, just and equitable compensation from the respondent No. 2. Since, the services of the petitioner have been terminated illegally by the respondent No. 2, therefore, in such a situation, it would be quite reasonable and justified if lump sum compensation of ` 50,000/- (` Fifty Thousand only) is awarded to the petitioner. Consequently, this issue is decided in favour of the petitioner and against the respondent No. 2.

Issue No. 3 :

33. In support of this issue, no evidence has been led by the respondent No. 2. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable against respondent No. 2. However, in view of my findings on issue No. 1, above, the petition is not maintainable against respondent No. 1. Accordingly, this issue is decided in favour of the petitioner and against the respondent No. 2.

Relief

As a sequel to my findings on the aforesaid issues, the claim of the petitioner is partly allowed and as such the respondent No. 2 is directed to pay ` 50,000/- (` Fifty Thousand only) as lump sum compensation to the petitioner within a period of three months from today failing which the same shall carry interest @ 9% per annum from the date of award till its realization. The reference is answered accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced in the open Court today on this 9th day of January, 2018.

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum-
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-**LABOUR COURT, SHIMLA**

Ref. No. 73 of 2013
Instituted on 5.10.2013
Decided on 9.1.2018

Sarika Patiyal s/o Shri R.L Patiyal, VPO Baral, Tehsil and District Hamirpur Through: J.C. Bhardwaj, President, HP-AITUC, H.Q. Saproon, Solan, H.P.

....Petitioner

VERSUS

1. M/s GVK EMRI, JP Motors Building, Village Anji, Barog Bye-Pass Solan, Distt. Solan, H.P. (Work Office).

2. M/s Adecco Flexione Workforce Solution Pvt. Ltd., C-127, Basement level, Satguru Infotech Phase-VIII Industrial Area Mohali - 160071 (Area Office).

3. M/s Adecco India Pvt. Ltd. No. 2, NAL Wind Tunnel road, Murugeshpalya, Bangolore (Corporate Office). *...Respondents*

Reference under section 10 of the Industrial Disputes Act, 1947.

For petitioner	:	Shri J.C Bhardwaj, AR
For respondent No. 1	:	Shri Rajat Sahotra, Advocate
For respondents No. 2 & 3	:	Shri C.M Sharma, Advocate

AWARD

The following reference has been received from appropriate government for adjudication:

"Whether termination of the services of Sarika Patiyal s/o Shri R.L Patiyal, VPO Baral, Tehsil and District Hamirpur, H.P. who was employed as Emergency Medical Technician,

w.e.f. 18.10.2012 by the Employer, (i) M/s GVK EMRI, J.P. Motors Building, Village Anji, Barog Bye-Pass Solan, District Solan, H.P. (Work Office) (ii) M/s Adecco India Private Limited, C-127, Basement Level, Satguru Infotech, Phase VIII, Industrial Area Mohali, (Area Office) and (iii) M/s Adecco India Private Limited, No. 2, NAL Wind Tunnel Road, Murugeshpalya, Bangalore, (Corporate Office) without complying the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefits and from which date the above worker is entitled to from the above employer?"

2. Briefly, the case of the petitioner is that on 23.12.2010, she was directly appointed by respondent No. 2 and thereafter her services were transferred on the rolls of respondent No. 1 and she continued as such till 18.10.2012 when her services were illegally terminated. It is further stated that the respondents being employers of the respondent constituted under the Companies Act are working in the project for the State of Himachal Pradesh under National Rural Health Mission Program (hereinafter referred as to NRHM), hence, the department of Health Services of Himachal Pradesh is providing services to the people through the said companies by employing various skilled workers such as pharmacists, drivers and other requisites supporting staff on contract basis as per the memorandum of understanding between the management of respondents and the State of Himachal Pradesh under the department of Health Services by adopting the aforesaid scheme and operating vehicles popularly known as 108 Ambulance to facilitate and to shift the patients to the hospital in emergency. It is further stated that the petitioner was appointed as Emergency Medical Technician (EMT) and was deputed with respondent No. 1 by respondent No. 2 while practicing unfair labour practices had tried to evade the liabilities which directly rests upon respondent No. 2 as well as on the department of Health Services. That the petitioner who is a qualified pharmacist by occupation and has undergone two years D. Pharmacy from Bhatia Ishwar Singh College, Moga was appointed by respondent No. 2 for operating the 108 Ambulance Services of Department of Health and remain posted at Civil Hospital Hamirpur from 23.12.2010 to 1.8.2012 and thereafter her services were transferred to PHC Sarhan in District Sirmour and again her services were transferred on 1.10.2012 from PHC Sarhan to Regional Civil Hospital Solan and she remained as such till 18.10.2012 when her services were illegally terminated. That since the petitioner was elected as President of the union and as such the respondents terminated her services on 18.10.2012 to teach her a lesson for the formation of the union. It is also stated that the work performed by the petitioner is similar being performed by the directly employed employees in the department of Health Services, hence, the workers employed through contractor be treated directly employed workmen for the wage/salary and for other benefits. That the work and conduct of the workman shown on the roll of the name lender contractor has been excellent throughout and the workers union made number of representations/demands but the respondents did not consider those representations/demands of the workmen for making payments at par with directly employed employees. That the petitioner had worked as EMT continuously with 108 Ambulance without any break and had completed 240 days in each calendar year and also in twelve calendar months preceding her termination. The petitioner was working atleast 15 to 18 hours daily since the date of her appointment without payment of any overtime as applicable under the law. It is stated that initially the petitioner was appointed for one year *w.e.f.* 23.12.2010 to 22.12.2011 but considering her honesty and sincerity towards the work, her services were extended from time to time by the respondents but immediately after the formation of the union, her services were illegally terminated without affording any opportunity to explain her position and without the compliance of the set procedure for retrenchment under the Industrial Disputes Act, 1947 (hereinafter referred as to Act) as neither any notice was served upon her nor any compensation was paid. It is further stated that the respondents have not closed their establishments and still are operating under the Department of Health Services and the services of the petitioner were terminated in violation of sections 25-G and 25-H of the Act. Against this back-drop a prayer has been made that the respondents be directed to reinstate the petitioner in service and regularize her as Emergency Medical Technician at the place

from where she was wrongly and illegally terminated on 18.10.2012. It is further prayed that the petitioner be ordered to be reinstated with full back-wages, seniority, continuity alongwith other incidental and consequential service benefits.

3. By filing separate reply, the respondent No. 1 contested the claim filed by the petitioner wherein preliminary objections have been raised qua maintainability, that there exists no cause of action in favour of the petitioner, suppression of material facts and that the petition is bad for non-joinder of necessary party. On merits, it has been denied that the petitioner was transferred on the rolls of respondent No. 1 from the rolls of respondent No. 2. It is asserted that the petitioner remained on the rolls of respondent No. 2 from the date of her appointment to the date of her termination on 20.10.2012. The respondent No. 1 employed various skilled workers such as pharmacists, drivers and other requisite supporting staff on contract basis as per memorandum of understanding between the State of HP and the management of the respondent No. 1 and the aforesaid skilled workers were supplied by respondent No. 2 to respondent No. 1, hence, these workers are on the rolls of respondent No. 2 and as such any liability directly rest upon the respondent No. 2 who had employed the petitioner on his rolls and it is the respondent No. 2 who is evading the liabilities without any legal and just reason. It is also asserted that any Trade Union formed by the workers union is not recognized by the management of the respondent No. 1 and no such intimation regarding the formation of any Trade Union was with the respondent No. 1. It is denied that since the petitioner was elected as President of the union, hence her services were terminated. It is asserted that the services of the petitioner were terminated by respondent No. 2. It is denied that the financial position of respondents is sound enough and can afford a little burden in case the workmen shown on the rolls of the name lender contractor's are paid the similar pay and allowances being paid to the direct employees. It is asserted that the respondent No. 1 is working with the Government under a public and private partnership scheme for providing health services and the Government is completely funding the respondent No. 1 and no funds are being put into by respondent No. 2 for providing the services and the respondent No. 2 is only managing the infrastructure and manpower to provide these facilities to the people of Himachal Pradesh. Moreover, the petitioner was found guilty of misconduct on the job on various times and has been given show cause notice and in her reply she had admitted her guilt and promised not to repeat the same. It is denied that the union made number of representations/demands but the respondents did not consider those representations/demands for making payments at par with the directly employed employees. It is further denied that the petitioner had completed 240 days in each calendar year and that she was working for 15 to 18 hours in a day. It is asserted that full and final settlement was done with the petitioner which was duly received by her. The respondent No. 1 prayed for the dismissal of the claim petition.

4. By filing separate reply, the respondents No. 2 and 3 have contested the claim filed by the petitioner wherein preliminary objections have been taken qua maintainability, that the replying respondents had pro*vide* d about 555 workers to respondent No. 1 and out of them about 535 workers are still working with GVK EMRI and the services of the petitioner were terminated as per decision of respondent No. 1 and the respondents No. 2 & 3 have no objection if the petitioner is reinstated by respondent No. 1, that the agreement for services executed between respondent No. 1 and respondents No. 2 & 3 was valid upto 9.8.2013 and thereafter the respondent No. 1 refused to renew this agreement, hence, the respondents No. 2 & 3 are unable to reinstate the services of the petitioner and to regularize her. On merits, it has been asserted that the petitioner was engaged with respondent No. 1 through respondents No. 2 & 3 only as per specific requirements of respondent No. 1 by executing an agreement which was not renewed by respondent No. 1 after 9.8.2013 and as per terms and conditions of letter of employment issued to the petitioner by the respondents No. 2 & 3, it was specifically mentioned that the services of the petitioner were engaged only for respondent No. 1 for operation/plying 108 Ambulance service in State of HP and as such the respondent No. 1 is responsible for the termination of the services of the petitioner. It is further

asserted that the respondent No. 1 is still operating under department of Health Services of State of HP but there are no contractual relations between respondent No. 1 and respondents No. 2 & 3 after 9.8.2013 and the respondent No. 1 is the sole authority to remove or retain a worker and the respondents No. 2 & 3 cannot force the respondent No. 1 to remove or retain a particular worker. The respondents No. 2 & 3 also prayed for the dismissal of the claim petition.

5. By filing separate rejoinders to the replies filed by the respondents, the petitioner reiterated her allegations by denying those of the respondents.

6. Pleadings of the parties gave rise to the following issues which were framed on 4.1.2016:

(1) Whether the termination of the services of the petitioner *w.e.f.* 18.10.2012 by the respondents without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged?

...OPP

(2) If issue No. 1 is proved in affirmative to what relief of service benefits the petitioner is entitled to?

...OPP

(3) Whether the petition is not maintainable as alleged?

...OPR-1

(4) Whether the petition is bad for non-joinder of necessary party as alleged?

...OPR-1

(5) Relief.

7. I have heard the AR for the petitioner and learned counsel for the respondents and have also gone through the record of the case carefully including the written arguments filed on behalf of respondent No. 1.

8. For the reasons to be recorded hereinafter while discussing issues for determination, my findings on the aforesaid issues are as under:—

Issue No. 1	Yes.
Issue No. 2	Entitled to lump sum compensation of ` 50,000/- (` Fifty Thousand only).
Issue No. 3	Yes.
Issue No. 4	Yes.
Relief	Reference partly answered in favour of the petitioner and against respondents No. 2 & 3 per operative part of award.

Reasons for findings

Issues No. 1 to 4

9. Being interlinked and correlated all these issues are taken up together for discussion and decision.

10. In support of her case, the petitioner stepped into the witness box as PW-1 to depose that on 23.12.2010, she was appointed as Emergency Medical Technician by the respondent No. 2 and she continued as such till 18.10.2012. She further stated that she was appointed by respondents No. 2 & 3 and thereafter she was deployed with respondent No. 1 and her services were terminated by respondent No. 1 without notice and payment of compensation. She further stated that neither any chargesheet was issued nor any enquiry was conducted against her. She also stated that her juniors were retained at the time of her termination and fresh hands were appointed after her termination. She stated that she was under the control and supervision of respondent No. 1 and she was the President of the union at the time of her termination and her services were terminated due to her legitimate union activities. In cross-examination on behalf of respondent No. 1, she admitted that no appointment letter was issued to her by respondent No. 1. She admitted that the appointment letter was issued to her by respondents No. 2 & 3. She denied that she was not the employee of respondent No. 1 and her services were terminated by respondents No. 2 & 3. When cross-examined on behalf of respondents No. 2 &3, she admitted that the respondents No. 2 & 3 had supplied 555 workers to the respondent No. 1 out of which 535 workers are still working. She further admitted that her services were terminated by respondent No. 1 as she was working under the control and supervision of respondent No. 1. She also admitted that the respondents No. 2 & 3 had supplied the workers to respondent No. 1 and that an agreement was entered by respondents No. 2 & 3 with respondent No. 1 for supply of labour which expired on 9.8.2013. She admitted that the services of the workers were neither terminated nor engaged by the respondent No. 1 on the recommendations of respondents No. 2 & 3.

11. On the other hand, the respondent No. 1 examined one Shri Daya Ram, Associate HR of respondent No. 1 company as RW-1, who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as made in the reply filed by respondent No. 1. He also tendered in evidence the copy of authority letter Ex. RW-1/B, memorandum of understanding dated 9.7.2010 Ex. RW-1/C and agreement for service dated 10.8.2010 Ex. RW-1/D. In cross-examination on behalf of respondents No. 2 & 3, he admitted that their company had entered into an agreement dated 10.8.2010 Ex. RW-1/D, with respondent No. 2 *vide* which the respondent No. 2 had recruited 555 workers and supplied to respondent No. 1. He denied that out of them 535 workers are still working with respondent No. 1 but volunteered that out of them 50 workers are working with the respondent No. 1. He admitted that all the workers are under the supervision of respondent No. 1. He denied that their company used to disburse the salary to the petitioner. When cross-examined on behalf of petitioner he admitted that the respondent No. 2 had recruited the workers to supply the same to respondent No. 1. He denied that those workers have become the workers of respondent No. 1. He denied that the respondent No. 1 used to mark the attendance of the petitioner. He admitted that MOU was executed with the State Government and respondent No. 1 only and there was no reference of respondent No. 2. He further admitted that neither any chargesheet was issued to the petitioner nor any enquiry was conducted against her regarding her alleged misconduct. He also admitted that the log book of the vehicle is maintained by respondent No. 1. He admitted that respondent No. 1 company used to issue identity cards. He further admitted that after the termination of the services of the petitioner 55 new workers were engaged by the respondent No. 1 company directly.

12. The respondents No. 2 & 3 have examined one Shri Raj Wadhwa, Senior Executive Compliances, who stepped into the witness box as RW-2 and tendered in evidence his affidavit Ex. RW-2/A. In cross-examination on behalf of respondent No. 1, he admitted that *vide* agreement dated 10.8.2010 Ex. RW-1/D, the workers were employed on contract basis with respondent No. 1 by respondents No. 2 & 3. He further admitted that termination letter was issued to the petitioner by respondents No. 2 & 3. He admitted that the salary and other allowances used to be paid through them. He denied that the respondent No. 1 had no role to play in termination of the petitioner. When cross-examined on behalf of petitioner he admitted that respondents No. 2 & 3 are liable for

all the benefits to the workers. He further admitted that the workers were used to be engaged as per the requirement of respondent No. 1. He also admitted that the respondent No. 1 had informed them regarding the termination of petitioner. He admitted that no enquiry was conducted against the petitioner by the respondents No. 2 & 3 prior to her termination. He further admitted that no retrenchment compensation was given to the petitioner and that many juniors to the petitioner are still working with the respondent No. 1.

13. By way of additional evidence, the respondent No. 1 examined RW-3 Shri Daya Ram, Associate (HR) GVK EMRI Dharampur who tendered in evidence the copy of certificate of registration under Contract Labour Act mark RY-1. In cross-examination on behalf of respondent No. 2, he denied that the workers were under the control of respondent No. 1. He further denied that the attendance registers, salary registers, etc., were being maintained by respondent No. 1. He also denied that Adecco (P) Ltd., only used to deploy the labour with respondent No. 1. When cross-examined on behalf of petitioner he denied that the Principal employer is the Director Health Services. He further denied that the workers are under the control and supervision of respondent No.1. He admitted that the contract with Adecco has come to an end in the year 2013.

14. I have closely scrutinized the entire evidence on record, and from the closer scrutiny thereof it has become clear that the respondent No. 1 had signed a memorandum of understanding Ex. RW-1/C with the State of HP on 9.7.2010 and as per the same, the respondent No. 1 was allowed to take skilled man power from a third agency. It has also become clear that in pursuance of the aforesaid memorandum of understanding, the respondent No. 1 entered into an agreement dated 10.8.2010 Ex. RW-1/D with respondent No. 2 and as per the same the man power was supplied to the respondent No. 1 by respondent No. 2. Admittedly, the services of the petitioner had been engaged by respondents No. 2 & 3 and she was further deputed with respondent No. 1. The AR for the petitioner contended that since the respondents No. 2 & 3 were not having any licence under section 12 of the Contract Labour (Abolition and Regulation) Act hereinafter referred to as Contract Labour Act, the petitioner would be deemed to be the direct employee of respondent No. 1. At this stage, it would be appropriate to reproduce sections 7 & 12 of the Contract Labour Act.

> **7. Registration of certain establishments.-—**(1) Every principal employer of an establishment to which this Act applies shall, within such period as the appropriate Government may, by notification in the Official Gazette, fix in this behalf with respect to establishments generally or with respect to any class of them, make an application to the registering officer in the prescribed manner for registration of the establishment……

> **12. Licensing of contractors.—** (1) With effect from such date as the appropriate Government may, by notification in the Official Gazette, appoint, no contractor to whom this Act applies, shall undertake or execute any work through contract labour except under and in accordance with a licence issued in that behalf by the licensing officer……

As per the provisions of section 7 & 12 of the aforesaid Act, the principal employer i.e respondent No. 1 should have a certificate of registration from the prescribed authority and secondly the contractor *i.e* respondent No. 2 should have a licence issued by competent authority *i.e* the Labour Department. On perusal of the record, it is clear that the principal employer *i.e* respondent No. 1 had the certificate of registration from the prescribed authority mark RY-1. However, the respondents No. 2 & 3 have failed to produce on record any licence issued by the competent authority.

15. Now, the question which arises for consideration before this Court is as to whether the petitioner would be deemed to be direct employee of the respondent No. 1 because her engagement as contract labour was in violation of section 12 of the Contract Labour Act as on the date of

engagement of the petitioner, the respondents No. 2 & 3 were not holding a licence under section 12 of the Contract Labour Act? This question was considered by **the Hon'ble Supreme Court in AIR 1992 SC 457, titled as Dena Nath & Ors** Vs. **National Fertilizers Ltd. And others** and it was held as under:

> "20……..The Act as can be seen from the scheme of the Act merely regulates the employment of contract labour in certain establishment and provide s for its abolition in certain circumstances. The Act does not provide for total abolition of contract labour but it provide s for abolition by the appropriate Government in appropriate cases under Section 10 of the Act.
>
> 22…….The only consequences pro*vide* d in the Act where either the principal employer or the labour contractor violates the provision of Sections 9 and 12 respectively is the penal provision, as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act……..."

The aforesaid judgment was considered by the Constitutional Bench of **Hon'ble Supreme Court in Steel Authority of India** Vs. **National Union Water Front 2000 (7) SCC-1** in which it was observed as under:

> "96. In Dena Naths case (*supra*), a two-Judge Bench of this Court considered the question, whether as a consequence of non-compliance with Sections 7 and 12 of the CLRA Act by the principal employer and the licensee respectively, the contract labour employed by the principal employer would become the employees of the principal employer. Having noticed the observation of the three-Judge Bench of this Court in the Standard-Vacuums case (*supra*) and having pointed out that the guidelines enumerated in sub-section (2) of Section 10 of the Act are practically based on the guidelines given by the Tribunal in the said case, it was held that the only consequence was the penal provisions under Sections 23 and 25 as envisaged under the CLRA Act and that merely because the contractor or the employer had violated any provision of the Act or the Rules, the High Court in proceedings under Article 226 of the Constitution could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. This Court thus resolved the conflict of opinions on the said question among various High Courts. It was further held that neither the Act nor the Rules framed by the Central Government or by any appropriate Government pro*vide* d that upon abolition of the contract labour, the labourers would be directly absorbed by the principal employer".

16. Hence, the perusal of the aforesaid judgments of the Hon'ble Apex Court shows that the consequence of violation of the Contract Labour Act *i.e* non-registration of the establishment under section 7 and non-possession of the licence under section 12 of the Act would not result in the absorption of concerned workman by the principal employer rather it would result in prosecution under section 23/25 of the Act. Therefore, in view of the aforesaid legal position, there is no force in the contention of the AR for the petitioner that in view of the fact that respondent No. 2 & 3 were not having any licence under section 12 of the Contract Labour Act, the petitioner would be deemed to be the direct employee of the respondent No. 1.

17. The next question which arises for consideration before this Court is as to whether the petitioner was the employee of respondent No. 1 or the employee of respondents No. 2 & 3. In **(2004) 3 SCC 514, Workmen of Nilgiri Coop. MKT. Society Ltd.** Vs. **State of T.N and others,** it has been held by the Hon'ble Supreme Court that where a person asserts that he was a workmen of the Company, and it is denied by the Company, it is for him to prove the fact. The relevant portion of the aforesaid judgment is reproduced as under :

"49. In Swapan das Gupta and Others *Vs.* The First Labour Court of West Bengal and Others [1975 Lab. I.C. 202] it has been held:

"Where a person asserts that he was a workman of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person."

50. The question whether the relationship between the parties is one of the employer and employee is a pure question of fact and ordinarily the High Court while exercising its power of judicial review shall not interfere therewith unless the finding is manifestly or obviously erroneous or perverse."

18. Therefore, in view of the aforesaid decision of the Hon'ble Supreme Court, the onus was upon the petitioner to prove employer and employee relationship between herself and respondent No. 1. However, no documentary evidence has been produced by the petitioner to show that she was the employee of respondent No. 1. Rather, the petitioner herself pleaded in claim petition that the respondent No. 2 initially appointed her directly as EMT on 23.12.2010 and was deputed with respondent No. 1 for 108 Ambulance service. The respondents No. 2 & 3 also pleaded in their reply to the claim petition that the services of the petitioner were engaged for respondent No. 1 for plying 108 ambulance service in HP. It has also been pleaded by respondents No. 2 & 3 that there is no contractual relation between respondent No. 1 and replying respondents after 9.8.2013. The petitioner while appearing in the witness box as PW-1 also deposed before the Court that she was appointed by the respondent No. 2 on 23.12.2010 and thereafter she was deployed with respondent No. 1. In cross-examination she admitted that no appointment letter was issued to her by respondent No. 1. She further admitted that her interview was conducted by Mr. Sandeep Sharma, Manager (HR) of respondents No. 2 & 3. She further admitted that appointment letter was issued to her by respondents No. 2 & 3. Therefore, the aforesaid admission made on the part of the petitioner clearly proves the fact that she was appointed by respondents No. 2 & 3. RW-1 Daya Ram has specifically stated that the petitioner was never on the pay rolls of respondent No. 1 neither she was ever taken on the pay rolls by respondent No. 1 from the pay rolls of respondent No. 2 and she remained on the pay rolls of respondent No. 2 from the date of her appointment till the date of her termination by respondent No. 2. He further stated that as per the service agreement Ex. RW-1/C, the manpower was deployed by the respondent No. 2 with respondent No. 1 and the petitioner was appointed by the respondent No. 2 and further deputed with respondent No. 1 to provide emergency services. He further stated that the respondent No. 1 has never issued any appointment letter to the petitioner and has never played any part or issued any letter of termination to the petitioner and the termination letter was issued by respondent No. 2. RW-2 in his affidavit by way of evidence specifically stated that the petitioner was employed as casual temporary employee for a fixed period of employment and her services were terminated by giving statutory notice/letter. He also admitted in cross- examination that the termination letter had been issued to the petitioner by respondents No. 2 & 3.

19. From the perusal of the evidence on record, it has become clear that the petitioner was appointed by respondent No. 2 on 23.12.2010 and after conducting her interview by Mr. Sanjeev Sharma, Manager (HR) of respondents No. 2 & 3, the appointment letter was issued to her by respondent No. 2 & 3. The termination letter dated 23.10.2012 has also been issued by respondents No. 2 which shows that the services of the petitioner were terminated by the respondent No. 2. Hence, the aforesaid evidence brought on record, clearly proves the fact that the petitioner was appointed and terminated by respondents No. 2 & 3 and not by respondent No. 1.

20. The AR for the petitioner contended that since the petitioner was under the direct control and supervision of respondent No. 1, therefore, she would be deemed to be direct employee

of respondent No. 1. **In (2009) 13 SCC titled as International Airport Authority of India** Vs. **International Air Cargo Workers Union and Anr.,** the Hon'ble Supreme Court explained the terms "control" and "supervision" which reads as under:

"38.The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor.

39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

53.13…… Merely because the contract labour work is under the supervision of the officers of the principal employer, it cannot be taken as evidence of direct employment under the principal employer.

54. ……..Exercise of some control over the activities of contract labour while they discharge their duties as labourers, is inevitable and such exercise is not sufficient to hold that the contract labour will become the direct employees of the principle employer."

In Agya Ram Vs. State of HP 2016 (4) LLJ 631, it has been held by our own Hon'ble High Court that the petitioners have to prove by leading e*vide* nce to demonstrate that the respondents had the control and supervision over them while discharging official duties. The relevant portion of the aforesaid judgment reads as under:

"26. Careful perusal of aforesaid law passed by Hon'ble Apex Court clearly suggests that Court while examining the question of employer and employee relationship is required to consider several factors as have been culled hereinabove by the Hon'ble Apex Court. Perusal of facts and circumstances of the case as well as evidence adduced on record, nowhere suggests that petitioners herein were able to prove aforesaid factors while claiming employer and employees relationship between them and respondents No. 2 and 3. As has been discussed in detail, petitioners have not placed on record appointment letters, if any, issued either by respondent No. 2 or respondent No. 3. Since, petitioners herein were unable to prove on record that they were appointed by respondents No. 2 and 3, several other factors as have been indicated hereinabove may not have much relevance as far as present cases are concerned. But otherwise also, perusal of impugned award nowhere suggests that petitioners were able to prove that they were being paid salary/remuneration by respondents herein. Similarly, petitioners have not led on record any evidence to demonstrate that respondents No. 2 and 3 had control and supervision over them while discharging official duties. (Emphasis supplied)

27. Hence, in view of the above, this Court finds no force in the contention put-forth on behalf of counsel representing petitioners that learned Tribunal below has fallen in error while rendering the findings that petitioners do not fall under definition of Section 2(s) of Industrial Disputes Act. Admittedly, in the present case petitioners were not able to prove on record relationship of employees and employer between them and respondents and, as such, it cannot be said that impugned award passed by learned Tribunal deserves to be quashed and set aside being perverse."

In Manoj Kumar Vs. **M/s Sintex Industries Pvt. Ltd., CWP No. 4675 of 2015, decided on 22.3.2016,** our own Hon'ble High Court has relied upon the decision of Hon'ble Apex Court in **Balwant Rai Saluja and another** Vs. **AIR India Limited and others (2014) 9 SCC 407** wherein it has been held as under:

"65.Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, *inter alia*, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v) whether there is continuity of service; and (vi) extent of control and supervision, *i.e.* whether there exists complete control and supervision. As regards, extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case (*supra*), the International Airport Authority of India case (*supra*) and the NALCO case." (emphasis supplied).

22. Therefore, in view of the aforesaid legal position, the facts in the present case are required to be seen. Though, the petitioner has denied in cross-examination that her attendance was marked by respondents No. 2 & 3. However, to prove this fact the petitioner has failed to produce any cogent and satisfactory evidence on record. The burden was upon the petitioner to prove by leading cogent and satisfactory evidence on record that she was working under the direct control and supervision of respondent No. 1. It has been admitted by the petitioner in her cross-examination that an agreement was entered by respondents No. 2 & 3 with respondent No. 1 for the supply of contract labour which expired on 9.8.2013. On the other hand, RW-1 categorically deposed in his evidence by way of affidavit that the petitioner was never taken on the payrolls of respondent No. 1 from the payrolls of respondents No. 2 & 3 and she remained on the payrolls of respondents No. 2 & 3 from the date of her appointment till the date of her termination. In cross-examination RW-1 has categorically stated that the respondent No. 2 had recruited 555 workers and supplied to respondent No. 1. In cross-examination by the petitioner, RW-1 admitted that the respondent No. 2 had recruited the workers for supplying the same to respondent No. 1. RW-1 denied that they have become the workers of respondent No. 1. He further denied that the attendance of the workers used to be marked by respondent No. 1. He stated that there was supervisory staff of respondent No. 2 for marking the presence of the workers. Moreover, RW-2 in his affidavit by way of evidence specifically stated that the petitioner was employed as casual temporary employee for a fixed period of employment and her services were terminated by giving statutory notice/letter. He admitted in cross-examination that the salary and other allowances used to be paid through them. He also admitted that the letter of termination was issued to the petitioner by respondents No. 2 & 3. Though, RW-2 admitted in cross-examination that the attendance of the workers used to be marked by respondent No. 1 and they were under the control and supervision of respondent No. 1 but no sufficient evidence has been brought on record by the respondents No. 2 & 3 to this effect. Moreover, RW-2 also admitted that the respondents No. 2 & 3 are liable for all the benefits to the workers.

23. Therefore, in view of the entire evidence on record led by the parties, it cannot be said that the petitioner was under the direct control and supervision of respondent No. 1. As observed earlier, the petitioner was appointed by respondents No. 2 & 3 and termination letter has also been

issued to her by the respondents No. 2 & 3. The perusal of the record reveals that the salary was also being paid to the petitioner by respondents No. 2 & 3. Therefore, from the perusal of entire evidence on record it has become clear that the petitioner was working under the control and supervision of respondents No. 2 & 3. Hence, in view of the entire evidence led by the parties, it can be safely held that the petitioner was not the employee of respondent No. 1 rather she was the employee of respondents No. 2 & 3. Therefore, it can safely be held that the petition is bad for non-joinder of respondent No. 1 and the same is not maintainable against respondent No. 1.

24. Though, the case of the respondent No. 1 is that the petitioner was found guilty of misconduct on various times and has been given show cause notice and in reply to that the petitioner had admitted her guilt and promised not to repeat the same. However, to prove the aforesaid misconduct against the petitioner no evidence was led by the respondent No. 1. Therefore, in the absence of any evidence on record, it cannot be said that the petitioner was guilty of misconduct while discharging her duties.

25. The AR for the petitioner next contended that the services of the petitioner had been terminated illegally without serving her any notice as required under section 25-N of the Act especially when she had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondents and fresh workers have been engaged in violation of the provisions of section 25-G and 25-H of the Act. On the other hand, the learned counsel for respondents No. 2 & 3 contended that the services of the petitioner were engaged for a fixed period of employment and therefore, the termination of the services of the petitioner does not fall within the scope of the terms "retrenchment" under section 2(oo) of the Act. It has been admitted by the petitioner in her claim petition that initially she was appointed for one year *w.e.f.* 23.12.2010 to 22.12.2011 but her services were extended from time to time till she was terminated on 18.10.2012. Admittedly, the petitioner was initially appointed for one year *w.e.f.* 23.12.2010 to 22.12.2011 but after 22.12.2011, no order extending the terms of the appointment of the petitioner has been placed on record by respondent No. 2. Therefore, the onus was upon the respondent No. 2. to prove that after 23.12.2011, the terms of the appointment of the petitioner had been extended by way of contract. However, no such order or contract has been placed on record by the respondent No. 2. No doubt, initially the petitioner was appointed for a fixed term of 12 months, however, after the expiry of 12 months also the petitioner continued in service. The respondent No. 2 had not discontinued her services *w.e.f* 23.12.2011. As observed earlier, no order extending the term of appointment or fixing the further terms of appointment has been placed on record by the respondent No. 2. Therefore, it can be safely held that no limitation was fixed regarding the period of employment of petitioner after 23.12.2011. That being the position, it is not possible to uphold the contention of the learned counsel for the respondent No. 2 that the termination of the services of the petitioner does not fall within the scope of retrenchment under section 2(oo) of the Act.

26. Admittedly, the respondent No. 2 has entered into an agreement Ex. RW-1/D with the respondent No. 1 on 10.8.2010 and provided its services to engage the petitioner alongwith about 555 other workers. RW-1 also admitted in cross-examination that the respondent No. 2 had recruited 555 workers and supplied them to respondent No. 1. While appearing in the witness box as PW-1, the petitioner categorically deposed that she had worked continuously 23.12.2010 till 18.10.2012. No evidence to the contrary has been placed on record by respondents No. 2 & 3 that she had not worked during the aforesaid period continuously. Therefore, in the absence of any evidence to the contrary, it has been established that the petitioner had completed 240 days in twelve calendar months preceding her termination. Since, the respondent No. 2 had engaged more than 100 workers as such the provisions of Chapter-V-B of the Act would apply in the present case. Therefore, it was incumbent upon the respondent No. 2 to have complied with the provisions of section 25-N of the Act before terminating the services of the petitioner. The provisions of section

25-N of the Act lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the employer to comply with those conditions as per clauses (a) & (b) which are mandatory in nature. Section 25-N of the Act reads as under:

Conditions precedent to retrenchment of workmen—

(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,—

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

However, in the present case, the perusal of the record shows that the respondent No. 2 has not complied with the conditions of section 25-N as enumerated in clause (a) & (b), precedent to the retrenchment of petitioner which are mandatory in nature as such the termination of the services of the petitioner by the respondents No. 2 & 3 was illegal and unjustified.

27. Therefore, in view of my forgoing discussion, I have no hesitation in holding that the services of the petitioner were terminated illegally without complying with the provisions of section 25-N of the Industrial Disputes Act, 1947. Hence, both these issues are decided accordingly.

Issue No. 2

28. Since, I have held under issue No. 1 above that the termination of services of the petitioner by the respondents No. 2 & 3 without complying with the provisions of section 25-N of the Act is illegal and unjustified. Therefore, the question which arises before this Court as to what service benefits the petitioner is entitled. From the perusal of record, it has become clear that the contract between the respondent No. 1 & respondent No. 2 expired on 9.8.2013 and thereafter the contract was not renewed. It is by now well settled that if the termination of employee is found to be illegal, the relief by way of reinstatement with back-wages is not automatic. The Hon'ble Supreme Court in **Santosh Kumar Seal and others reported in 2010 LLR 677: 2010 III CLR 17 SC**, has held that relief by way of reinstatement with back wages is not automatic even if of an employee is found to be illegal or is in contravention of the prescribed procedure and that mandatory compensation in lieu of reinstatement and back wages in cases of such nature may be appropriate.

29. In Jagbir Singh *Vs.* Haryana State Agricultural Marketing Board (2009) 15 SCC 327, the Hon'ble Supreme Court has held that :

"It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement with full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and

may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice."

30. In the present case, even though the termination of the petitioner is held to be illegal but his reinstatement would not be appropriate relief as the contract between the respondent No. 1 and respondent No. 2 expired on 9.8.2013 and the respondents No. 2 & 3 are not providing service in the Project wherein the petitioner was engaged. Therefore, in such a situation it would not be appropriate to make the order for reinstatement of the petitioner in the present case. Hence, taking into account all the facts and circumstances of the case, the ends of justice would be met, if the lump sum compensation is awarded to the petitioner. Therefore, in my view the petitioner is entitled to receive a suitable, appropriate, just and equitable compensation from the respondents No. 2 & 3. Since, the services of the petitioner have been terminated illegally by the respondents No. 2 & 3, therefore, in such a situation, it would be quite reasonable and justified if lump sum compensation of ` 50,000/- (` Fifty Thousands only) is awarded to the petitioner. Consequently, this issue is decided in favour of the petitioner and against the respondents No. 2 & 3.

Relief

As a sequel to my findings on the aforesaid issues, the claim of the petitioner is partly allowed and as such the respondents No. 2 & 3 are directed to pay ` 50,000/- (` Fifty Thousands only) as lump sum compensation to the petitioner within a period of three months from today failing which the same shall carry interest @ 9% per annum from the date of award till its realization. The reference is answered accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced in the open Court today on this 9th day of January, 2018.

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum- *Labour Court, Shimla.*

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM**-LABOUR COURT, SHIMLA**

Ref No. 31 of 2015
Instituted on 30.7.2015
Decided on 17.1.2018

Raj Kumar s/o Shri Ram Lal, V.P.O. Kohil-Majra, Tehsil Nalagarh, Distt. Solan, H.P. Through J.C. Bhardwaj, President, H.P. AITUC, Saproon Solan, H.P.

..Petitioner

VS.

M/s Indo Farm Equipment Limited, EPIP, Phase-II, Village Thana, P.O. Baddi, Distt. Solan, H.P. Through its Factory Manager/Occupier

..Respondent

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri J.C Bhardwaj, AR

For respondent : Shri H.R Thakur, Advocate

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"Whether termination of services of Shri Raj Kumar s/o Shri Ram Lal, V.P.O. Kohil Majra, Tehsil Nalagarh, Distt. Solan, H.P. *w.e.f.* 26.02.2014 by the Employer/Management of M/s Indo Farm Equipment Ltd. EPIP, Phase-II, Village Thana, P.O. Baddi, Distt. Solan, H.P. without complying with the provisions of the Industrial Disputes Act, 1947 as alleged by workman, is legal and justified? If not, to what relief of reinstatement & compensation the above aggrieved workman is entitled to from the above management?"

2. Briefly, the case of the petitioner is that during the month of January, 2007, he was appointed as mechanic in the employment of respondent company and at the time of removal from the employment, he was drawing salary of ` 7365/- per month along-with other benefits and he remained as such till 26.2.2014 when his services were terminated during the pendency of order of reference No.11-2/93(Lab.)ID/Baddi/2014/Indo Farm and that too without saving express permission under section 33(1) (a&b) of the Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is further pleaded that the impugned order of termination of the services of the petitioner by the respondent was pre-planned under a conspiracy with malafide designs because the management always intended to dispense with the services of the petitioner due to his legitimate Trade Union activities as a "Trade Unionist" and the respondent management is also guilty for non implementation of their own settlement dated 15.2.2014 which was arrived at under section 18(1) of the Act *vide* which the petitioner was absolved from all the disciplinary proceedings and the so called enquiry was merely eyewash. That the management did each and everything to malign the work and conduct of the petitioner due to his most legitimate trade union activities and the management terminated the services of the petitioner on the basis of withdrawn enquiry of 26.9.2013 and even the chargesheet was replied by the petitioner but the management was adamant to get the petitioner removed from the employment on one or the other pretext. The documents with the chargesheet were not supplied by the respondent to the petitioner and in the absence of the documents the petitioner could not file a specific reply. It is further pleaded that the petitioner was not allowed the defecne assistant of his choice to defend himself in the enquiry and that the petitioner being the elected President of the union is deemed to have been declared protected workman for all purposes and his removal from service had been ordered against the provisions of section 25-N of the Act. That neither any chargesheet nor any enquiry was held against the petitioner after the settlement dated 15.2.2014 wherein all disciplinary proceedings were withdrawn and dropped against all the workmen and as such the case of the petitioner is duly covered under the definition of retrenchment. Against this back-drop a prayer has been made that the enquiry conducted by the respondent management be declared null, void and inoperative and partial and the impugned domestic enquiry report and termination order be set aside and the respondent management be directed to reinstate the petitioner in service with full back-wages, seniority and other consequential service benefits.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken qua maintainability and that the petitioner had indulged in making false and baseless allegations and concealment of material information. On merits, it has been asserted that the services of the petitioner were terminated after holding a fair and legal

domestic enquiry and there is no mention in the settlement dated 15.2.2014 arrived at under section 18(1) of the Act that pending enquiries will be withdrawn and the persons will be absolved from this misconduct. It is further asserted that a chargesheet dated 26.9.2013 was issued to petitioner for his misconduct and independent enquiry officer was appointed and a fair and proper enquiry was conducted that too after affording full opportunity to the petitioner. That the petitioner was neither related to any union nor he was office bearer of any union. It is also asserted that the termination order dated 26.2.2014 was issued to the petitioner on the basis of domestic enquiry in which the misconducts were proved against him. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reiterated the averments made in the claim petition by denying those of the respondent.

5. On the pleadings of the parties, the following issues were framed on 30.5.2016:—

(1) Whether the termination of the services of petitioner *w.e.f.* 26.2.2014 by the respondent without complying with the provisions of Industrial Disputes Act, 1947 is illegal and unjustified as alleged?

...OPP

(2) If issue No. 1 is proved in affirmative, to what relief and service benefits the petitioner is entitled?

..OPP

(3) Whether the petition is not maintainable as alleged?

...OPR

(4) Relief.

6. I have heard the AR and learned counsel for the parties and have also gone through the record of the case.

7. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue No. 1	Decided accordingly.
Issue No. 2	Entitled to reinstatement with seniority and continuity but without back-wages.
Issue No. 3	No.
Relief	Reference partly answered in favour of the petitioner and against the respondent per operative part of award.

Reasons for findings

Issue No. 1

8. To prove issue No. 1, the petitioner stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reiterated almost all the averments as made in the claim petition. He also tendered in evidence the copy of reference No. 24/2014 Ex. P-1 which is pending before this Court, copy of representation made to CMD Ex. P-2, copy of settlement executed between the workers union and the management Ex. P-3, copy of chargesheet Ex. P-4,

reply to chargesheet Ex. P-5, copy of intimation of union election sent to the respondent Ex. P-6, postal receipt Ex. P-6/1, copy of intimation of union election sent to the CMD Ex. P-7, postal receipt Ex. P-7/1, letter of termination Ex. P-8 and copy to the Labour Commissioner against the unfair labour practice by the management through registered post Ex. P-9. In cross-examination, he denied that on 23.9.2013, during duty hours he had spoiled one piece of cylinder block. He further denied that on 24.9.2013 he had shown inefficiency in work without any reason. He admitted that he had received the chargesheet Ex. P-4. He denied that the enquiry report was withdrawn as per the settlement Ex. P-3. He further denied that in the reference Ex. P-1, he was not the party. He also denied that the enquiry against him was conducted in a fair and proper manner.

9. On the other hand, the respondent examined two RWs. RW-1 Shri A.C Arya, deposed that he was appointed as an enquiry officer to conduct the enquiry against the petitioner *vide* letter dated 18.10.2013 Ex. RW-1/A and *vide* letter Ex. RW-1/B, the petitioner was intimated about the date, time and place of hearing and thereafter on 9.11.2013, the enquiry was commenced and the petitioner participated in the enquiry and he was represented by a co-worker Shri Sanjeev Kumar and all the documents were supplied to the petitioner and the next date was fixed for 30.11.2013. He further deposed that on 3.12.2013, the management evidence was recorded and the witnesses were cross-examined by the representative of the petitioner and on the next date *i.e* on 16.12.2013, the petitioner was not present and the proceedings were adjourned to 23.12.2013 but the petitioner failed to appear and the next date was fixed for 6.1.2014 and a registered letter alongwith postal receipt dated 24.12.2013 Ex. RW- 1/C was issued to the petitioner. He also stated that on 6.1.2014, despite intimation through registered post the petitioner did not attend the enquiry proceedings and was proceeded against *ex-parte* and the next date was fixed for 24.1.2014 on which date the remaining evidence of the management was recorded. He also deposed that the enquiry proceeding is Ex. RW-1/D and thereafter he submitted the enquiry report dated 7.2.2014 Ex. RW-1/E. In cross-examination, he denied that he had not supplied all the documents to the petitioner on the first date of enquiry. He further denied that the petitioner had not threatened anybody and being the President of the workers union, a false charge was leveled against him. He further denied that the petitioner was proceeded against *ex-parte* intentionally. He denied that the petitioner was never represented by a co-worker Shri Sanjeev Kumar.

10. RW-2 Shri Chattar Singh tendered in e*vide* nce his affidavit Ex. RW-2/A wherein he reiterated almost all the averments as made in the reply. He also tendered in e*vide* nce the appointment letter Ex. RW-2/B. In cross-examination, he admitted that *vide* letter Ex. RW- 1/A, the enquiry against the petitioner was ordered by the Assistant General Manager. He admitted that at the time of the termination of the services of the petitioner, a reference No. 24/2014 was pending before this Court. He further admitted that no application for approval/permission was filed by the respondent before this Court for seeking approval of the termination of the services of the petitioner. He denied that alongwith the chargesheet, the documents were not supplied to the petitioner. He admitted that second show cause notice was not issued to the petitioner before terminating his services.

11. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof, it has become clear that the petitioner was appointed as mechanic by the respondent in the month of January 2007 and his services were terminated on 26.2.2014. It is also not in dispute that on 26.9.2013, a chargesheet Ex. P-4 was issued to the petitioner to which the petitioner filed reply dated 9.10.2013 Ex. P-5. Since, the reply of the petitioner was not found satisfactory as such the respondent initiated an enquiry against the petitioner and Shri A.C Arya was appointed as an enquiry officer to conduct the enquiry against the petitioner *vide* letter dated 18.10.2013 Ex. RW-1/A. The AR for the petitioner contended that the enquiry was not conducted in fair and proper manner and the petitioner was wrongly proceeded against *ex-parte*. Therefore, the onus was upon the petitioner to prove that the enquiry was not conducted in fair and proper manner and he was

wrongly proceeded against *ex-parte*. It is a settled law that obligation to lead evidence to establish an allegation made by a party is upon the party making the allegation. The test would be as to who would fail if no evidence is led. The party making the allegations and seeking the redressal must seek an opportunity to lead evidence. However, except for the bald statement of the petitioner he had failed to lead any evidence on record that the enquiry conducted against him was not fair and proper and he was wrongly proceeded against *ex-parte*. The perusal of the evidence on record makes it clear that a notice dated 28.10.2013 Ex. RW-1/B was issued to the petitioner intimating him the date, time and place of hearing. It has also become clear that thereafter enquiry against the petitioner commenced on 9.11.2013. Initially, the petitioner participated in the enquiry and also cross-examined the witnesses of the management. However, later on the petitioner did not participate in the enquiry and he was proceeded against *ex-parte* and after recording the remaining evidence of the management, the enquiry proceedings were concluded and the enquiry report dated 7.2.2014 Ex. RW-1/E was submitted by the enquiry officer in which the charges no 1 to 4 levelled against the petitioner *vide* chargesheet Ex. P-5 stood proved against the petitioner. Thereafter, on the basis of the enquiry report, the services of the petitioner were terminated *vide* termination letter dated 26.2.2014. RW-1 specifically deposed that the enquiry had commenced on 9.11.2013 and the petitioner participated in the enquiry and was represented by co-worker Shri Sanjeev Kumar on which date all the documents were supplied to the petitioner. He further deposed that on 3.12.2013, the evidence of the management was recorded and the witnesses were cross-examined by the representative of the petitioner but on the next date i.e on 16.12.2013, the petitioner was not present and the proceedings were adjourned to 23.12.2013 on which date also the petitioner was not present. He further deposed that the next date was fixed for 6.1.2014 and a registered letter along-with postal receipt Ex. RW-1/C was issued to the petitioner intimating him the next date of hearing as 6.1.2014 but despite intimation the petitioner did not attend the enquiry proceedings and was proceeded against ex-parte. He also deposed that on the next date i.e on 24.1.2014, the remaining e*vide* nce of the management was recorded and he submitted the enquiry report Ex. RW-1/E on 7.2.2014. The statement of RW-1 is corroborated by RW-2 Shri Chattar Singh who also deposed that despite intimation of the date of enquiry as 6.1.2014 through registered post, the petitioner failed to attend the enquiry proceedings and was proceeded against ex-parte. Therefore, from the perusal of the entire evidence on record, it has become clear that the petitioner was duly intimated by the respondent about the next date of enquiry but he intentionally failed to appear in the enquiry proceedings and as such he was rightly proceeded against *ex-parte*. Now, the question which arises for consideration before this Court is as to whether the petitioner can allege violation of principles of natural justice despite being aware about the enquiry proceedings. The Hon'ble Supreme Court in a catena of judgments held that the employee failing to participate in the enquiry proceedings being aware of the enquiry, cannot complain violation of the principles of natural justice. In **AIR 2008 SC (Supl.) 1542, Board of Directors H.R.T.C** Vs. **K.C Rahi,** it has been held that if an employee does not participate in the enquiry proceedings being well aware of departmental enquiry, he is estopped from raising the question of non-compliance of the principles of natural justice. The relevant portion of the aforesaid judgment is reproduced as under:

> "……..The Tribunal also held that from the representation dated 09.08.1993 and 19.10.1993 it would clearly show that the respondent was well aware of the departmental enquiry which was initiated against him, however, he intentionally avoided service of notice and did not participate in the enquiry proceedings and, therefore, he was estopped from raising the question of non- compliance of the principle of natural justice……".
>
> Furthermore, **in (2008)-4 SCC 42, Pepsu Road Transport Corporation** Vs. **Rawel Singh,** it has been held as under:
>
> "15……. We are not entering into correctness or otherwise of the allegations of the Corporation. One thing, however, is certain that in spite of service of

show cause notice, the respondent failed to appear at the enquiry and the Enquiry Officer had to proceed with the enquiry in absence of the respondent.

16. Apart from that it is also clear from the record that so far as the charge as to unauthorized absence of the respondent is concerned, the same is duly established from the record. The Enquiry Officer, in our opinion, rightly observed that charges (ii) and (iii) were consequential in nature and based on charge (i) and hence all the charges can be said to have been proved against the respondent. In our judgment, the Labour Court was wholly wrong in holding that enquiry was not fair. To us, it is not a case of not extending an opportunity to the employee but not availing of opportunity by the employee. Therefore, the finding recorded by the Labour Court that the enquiry was vitiated being violative of natural justice and fair play is based on 'no evidence' and must be set aside".

Similarly, **in (1997) 10 S.C.C 386, Ranjan Kumar Mitra** Vs**. Andrew Yule & Co. Ltd., and others** it has been observed as under:

"1. In view of the fact that the appellant's services were terminated after an enquiry in which the appellant chose not to participate, we are of the view that the appellant cannot assail his termination on merits even assuming that the writ petition filed by his in the High Court was maintainable. For this reason, it is not necessary to examine the correctness of the High Court's view that the writ petition was not maintainable. The dismissal of the appeal by this Court is, therefore, not to be construed as an expression of any opinion on the merits of the view taken by the High Court on the question of maintainability of the writ petition."

12. Therefore, in view of the aforesaid decisions of Hon'ble Supreme Court, the petitioner is estopped from raising the plea of non-compliance of principles of natural justice as he failed to participate in the enquiry despite being aware about the enquiry proceedings. I have perused the enquiry proceedings as well as enquiry report and from the perusal of the evidence of the respondent and also the enquiry proceedings Ex. RW-1/D and enquiry report Ex. RW-1/E, it stands established on record that the charges leveled against the petitioner stood duly proved as per the enquiry report Ex. RW-1/E.

13. The AR for the petitioner next contended that there has been violation of section 33-A of the Act in dismissing the services of the petitioner as at the time of the termination of the petitioner, reference No. 64 of 2014 Ex. P-1 was pending in this Court. However, from the perusal of the reference Ex. P-1, it has become clear that the petitioner is not a party in the aforesaid reference and the same does not pertain to the present petitioner. The AR for the petitioner failed to satisfy this Court as to how the petitioner was connected with the dispute pertaining to the reference No. 16 of 2014 Ex. P-1. Since, the petitioner is not connected with the dispute referred by way of aforesaid reference, therefore, it cannot be said that there has been a violation of section 33 of the Act while terminating the services of the petitioner.

14. Now, the next question which arises for consideration before this Court is as to whether the punishment imposed upon the petitioner is disproportionate to the gravity of the misconduct and whether this Court can interfere in the punishment imposed by the respondent. The charges leveled against the petitioner *vide* chargesheet Ex. P-4 are as under:

Charge No. 1: That the petitioner stopped a workman and threatened him not to work on over time and not to give more production.

Charge No. 2: That on 24.9.2013, the petitioner had given 60% less production.

Charge No. 3: That on 23.9.2013, the petitioner intentionally damaged one piece of cylinder block due to which the company suffered financial losses.

Charge No. 4: That the petitioner used to remain absent from his work place and also used to found talking with his co- workers.

Charge No. 5: That the petitioner does not achieve targets as a result of which the company used to suffer losses in production.

As per the enquiry report Ex. RW-1/E, charges No. 1 to 4 stood proved against the petitioner whereas charge No. 5 could not be proved against him and his services had been terminated *w.e.f.* 26.2.2014. In the opinion of this Court, the dismissal of the petitioner on the charges 1 to 4 levelled in the chargesheet Ex. P-4, is excessively high and grossly disproportionate to the gravity of misconduct. The charges No. 1 to 4 leveled against the petitioner cannot be regarded as an act of grave misconduct. **In (2005) 3 S.C.C 134, Mahindra and Mahindra Ltd.** Vs. **N.B Narawade,** it has been held by the Hon'ble Supreme Court that after introduction of section 11 –A in the Industrial Disputes Act certain amount of discretion is vested with the Labour Court/ Tribunal in interfering with the quantum of punishment whereby the concerned workman is found guilty of the misconduct. The relevant portion of the aforesaid judgment is reproduced as under:

> "20. It is no doubt true that after introduction of Section 11-A in the Industrial Disputes Act, certain amount of discretion is vested with the Labour Court/Industrial Tribunal in interfering with the quantum of punishment awarded by the Management where the workman concerned is found guilty of misconduct. The said area of discretion has been very well defined by the various judgments of this Court referred to hereinabove and it is certainly not unlimited as has been observed by the Division Bench of the High Court. The discretion which can be exercised under Section 11-A is available only on the existence of certain factors like punishment being disproportionate to the gravity of misconduct so as to disturb the conscience of the court, or the existence of any mitigating circumstances which requires the reduction of the sentence, or the past conduct of the workman which may persuade the Labour Court to reduce the punishment. In the absence of any such factor existing, the Labour Court cannot by way of sympathy alone exercise the power under Section 11-A of the Act and reduce the punishment." (emphasis supplied).

15. In the present case, no evidence has been led by the respondent that the past service record of the petitioner was not clean. No other misconduct had been pointed out against him. Admittedly, the petitioner had been engaged as a mechanic and not in a sensitive post and this is not a case of financial irregularity, misappropriation or using abusive language against the superior officers which require an extreme penalty of dismissal. Hence, in view of the entire evidence led by the parties and also in view of the facts and circumstances of the present case, this Court is of the opinion that the quantum of punishment imposed upon the petitioner was too harsh and wholly disproportionate to his act of misconduct. Therefore, looking into the charges No. 1 to 4 having been proved against the petitioner *vide* chargesheet Ex. P-4 and keeping in view his past service record, the punishment of dismissal of the services of the petitioner *w.e.f.* 26.2.2014 is hereby set aside and quashed. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Issue No. 2

16. Since, I have held under issue No. 1 above that the termination of the services of the petitioner *w.e.f.* 26.2.2014 by the respondent is illegal and unjustified, hence, the petitioner is held entitled to reinstatement in service with seniority and continuity.

17. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the AR for the petitioner. In (**2009) 1 SCC 20, Kanpur Electricity Supply Company Limited** Vs. **Shamim Mirza,** the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals** Vs. **Prabhakant Shukla** that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

18. Moreover, the petitioner was under an obligation to prove by leading cogent evidence that he was not gainfully employed after the termination of her services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by the **Hon' ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another** Vs. **S.C Sharma** that:

> "16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

19. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Therefore, in view of the aforesaid judgments of the Hon'ble Supreme Court, I have no hesitation in holding that the petitioner is not entitled to any back- wages. Hence, this issue is decided partly in favour of the petitioner and against the respondent.

Issue No. 3

20. In support of this issue, no evidence has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate government to this Court for adjudication. I find nothing wrong with this petition which is legally maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief

As a sequel to my above discussion and findings on issues No. 1 to 3, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages and as such the reference is answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 17th day of January, 2018.

(SUSHIL KUKREJA)
Presiding Judge, Industrial Tribunal-cum- *Labour Court, Shimla.*

4.1.2018.

Present: None for LR's of deceased/petitioner.
Shri Mahender Singh, ADA for respondent.

As per the acknowledgements received back, the notices issued to the LR's of deceased namely Jitender, Manoj Kumar and Sarita Devi have been duly served and as per the Track Consignment report the notice issued to Ms. Sheela, LR of deceased/petitioner has been duly served to her but despite that none appeared before this Court. It is 10.45 A.M. Case called twice but none appeared on behalf of the LR's of the deceased/petitioner. Be awaited.

(SUSHIL KUKREJA)
Presiding Judge, Labour Court, Shimla.

Case called again

Present: None for LR's of the deceased/petitioner.
Shri Mahender Singh, ADA for respondent.

It is 12.40 A.M. Case called again but none appeared on behalf of the LR's of the deceased/petitioner. Be called after lunch.

(SUSHIL KUKREJA)
Presiding Judge, Labour Court, Shimla.

Case called after lunch

Present: None for the LR's of the deceased/petitioner.
Shri Mahender Singh, ADA for respondent.

It is 3.15 P.M. Case called repeatedly in pre and post lunch sessions but none appeared on behalf of LR's of the deceased/petitioner. For today, the case has been listed for the service of LR's of deceased/petitioner but despite having been served none appeared before this Court which clearly shows that they (LR's) are not interested to pursue this case arising out of the reference. Therefore, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file.

The following reference has been received from appropriate government for adjudication:

"Whether alleged termination of services of Shri Daya Nand s/o Shri Karam Singh, r/o Village Singhpur, P.O Mashobra, Tehsil and District Shimla HP during July 1986 by the Executive Engineer, I&PH Division No. 1 Kasumpati Shimla who had worked for 74 days only during the year 1986 as beldar on daily wages with above employer and has raised his industrial dispute after about 27 years, allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not keeping in view the working period of 74 days only and delay of about 27 years in raising the industrial dispute what amount of back-wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"

From the aforesaid reference is the clear that the petitioner (since deceased) has alleged his termination of services to be illegal during July 1986 but despite having been served, the LR's of the deceased have failed to appear before this Court. Furthermore, from the reference itself it is also clear that the deceased had worked with the respondent department only for 74 days and the present industrial dispute was raised after a period of about 27 years. Since, the LR's of the deceased have failed to appear before this Court and to file statement of claim, therefore, in the absence of any material on record, it cannot be said that the services of the deceased Daya Nand were illegally terminated without complying with the provisions of the Industrial Disputes Act, 1947. Hence, the reference is answered in the negative. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced:
4.1.2018

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM**-LABOUR COURT, SHIMLA**

Ref No. 57 of 2016

Instituted on 13.7.2016

Decided on 18.1.2018

Roshan Lal s/o Shri Dhani Ram, r/o Village Kasmali, P.O Saryanj, Tehsil Arki, District Solan, H.P.

..Petitioner

VS.

The Executive Engineer, Forest, Forest Department Talland, District Shimla, HP.

..Respondent

Reference under section 10 of the Industrial Disputes Act, 1947.

For petitioner : Shri Naresh Sharma, Advocate Vice
Shri Neel Kamal Sood, Advocate.
For respondent : Shri Mahinder Singh, ADA

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"Whether alleged termination of services of Shri Roshan Lal s/o Shri Dhani Ram, r/o Village Kasmali, P.O. Saryanj, Tehsil Arki, Distt. Solan, H.P. during April 2000 by the Executive Engineer (Forest), Forests Department, Talland, Shimla-1, H.P., who had worked for 91, 82, 17 & 81 days only during the years 1996-97, 1997-98, 1998-99 & 1999-2000 respectively and has raised his industrial dispute after about more than 11 years allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is

legal and justified? If not, keeping in view the working period of 91, 82, 17 & 81 days only during the years 1996-97, 1997-98, 1998- 99 & 1999-2000 and delay of more than 11 years in raising the industrial dispute, what amount of back wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer?"

2. Briefly, the case of the petitioner is that initially *w.e.f.* 1994 he was appointed as Class-IV employee (Mason) on daily wages basis with the respondent and worked as such till the year 2000 and thereafter his services were orally terminated without any reason and without serving any prior notice as required under law and also without complying with the provisions of Industrial Disputes Act, 1947 (hereinafter referred as to Act). It is further stated that after the appointment of petitioner, he worked at various places under respondent till the year 2002 and his services were terminated without serving any prior notice under section 25-F of the Act and without paying any compensation. It is also stated that many juniors namely Ratti Ram, Kali Ram, Ramu, Bhadur Naru, Mankali and many other juniors to the petitioner were retained violating the provisions of sections 25-G and 25-H of the Act and their services had been regularized and the services of the petitioner have been terminated despite the fact that he had completed 240 days in twelve calendar months and even preceding to the date of his oral termination. It is stated that the petitioner made several requests seeking re-employment by visiting the office of the respondent number of times but of no avail. Against this back-drop a prayer has been made that directions be issued to the respondent to re-instate the petitioner in service alongwith all consequential service benefits including back-wages.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken qua maintainability and that the claim petition is barred by limitation. On merits, it has been asserted that the petitioner was initially engaged as Mistri (Mason) on daily wages in construction unit-Chakkar *w.e.f.* 21.8.1996 and worked upto 31.3.2000 and as per the record he had never completed 240 days in any calendar year. It is further asserted that the petitioner had left the job at his own on the completion of the work and was not removed by the respondent, hence, the provisions of the Act are not attracted in this case. That the respondent department never engaged any fresh person after the petitioner left the job and as such the provisions of section 25-G and 25-H of the Act have not been violated by the respondent. It is also asserted that Shri Kali Ram was engaged *w.e.f.* 21.9.1988, Shri Ratti Ram was engaged *w.e.f.* 1.1.1988, Shri Ramu was engaged *w.e.f.* 7.9.1991, Shri Bahadur Naru was engaged *w.e.f.* 4.4.1991 and Smt. Mankali was engaged *w.e.f.* 7.9.1991 and they worked as daily wager mazdoors and completed the requisite 240 days in a calendar year continuously and were regularized as per the policy of the State Government whereas the petitioner had not completed 240 days in any of the calendar year and left the work at his own. It is also asserted that no representation for employment was received by the respondent from the petitioner and he never visited the office of employment. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reaffirmed his allegations by denying those of the respondent.

5. On the pleadings of the parties, the following issues were framed on 25.4.2017:

(1) Whether the termination of the services of petitioner during April, 2000 without complying with the provisions of Industrial Disputes Act, 1947 is illegal and unjustified as alleged?

OPP.....

(2) If issue No. 1 is proved in affirmative, to what relief of service benefits the petitioner is entitled?

OPP.....

(3) Whether the claim petition is not maintainable as alleged?

OPR……..

(4) Whether the claim petition is barred by limitation as alleged?

OPR…….

(5) Relief.

5. I have heard the learned counsel for the parties and have also gone through the record of the case.

6. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under:

Issue No. 1	No
Issue No. 2	Becomes redundant.
Issue No. 3	No
Issue No. 4	Yes
Relief	Reference answered in favour of the respondent and against the petitioner per operative part of award.

Reasons for findings

Issues No. 1 & 4

7. Being interlinked and correlated both these issues are taken up together for discussion and decision.

8. The learned counsel for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving him any notice as required under section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondent and fresh workers have been engaged in violation of the provisions of section 25-G and 25-H of the Act.

9. On the other hand, learned ADA for the respondent contended that the claim of the petitioner is highly belated and stale. He further contended that the services of the petitioner had never been terminated by the respondent who had left the job at his own and even he had not completed 240 days in any calendar year. He also contended that no junior to the petitioner had been retained and no fresh hands had been engaged by the respondent, hence, he is not entitled to any relief.

10. To prove issue No. 1, the petitioner stepped into the witness box as PW-1 and tendered in evidence his affidavit Ex. PW-1/A wherein he reiterated almost all the averments as stated in the claim petition. He also tendered in evidence the list of juniors to him mark PX. In cross-examination, he denied that he was never engaged in the year 1994. He further denied that he had not completed 240 days in any calendar year from 21.8.1996 to 31.8.2000. He also denied that his services were never terminated and he had left the job at his own. He denied that he had never

approached the department for his re-instatement. He further denied that neither any junior has been retained nor any fresh hands have been engaged. He also denied that Ratti Ram, Ramu, Bahadur Naru and Smt. Mankali were not his juniors and they had completed 240 days in each calendar year.

11. On the other hand, the respondent examined one Shri Tulsi Ram, Deputy Ranger as RW-1 who tendered in evidence his affidavit Ex. RW-1/A wherein he reiterated almost all the averments as stated in the reply. He also tendered in evidence the mandays chart Ex. RW-1/B, month wise mandays chart Ex. RW-1/C, month-wise working days detail Ex. RW-1/D and year-wise working detail of Shri Nar Bahadur, Arjun Dev, Ramu, Smt. Mankali and Shri Kanam Singh Ex. RW-1/E. In cross-examination he admitted that the petitioner was working in their department and he was engaged on 21.8.1996 and worked till 31.3.2000. He denied that the petitioner had worked continuously and completed 240 days in each calendar year. He admitted that the information under RTI Act mark PX and mark PY has been supplied by their office. He further admitted that some of the daily wagers have been engaged from the year 1996 to 1999. He denied that all the workers mentioned in the list mark PX and mark PY have been regularized. He admitted that no notice was issued and no compensation was given to the petitioner prior to his termination. He further admitted that no notice was issued to the petitioner for resumption of duties.

13. I have closely scrutinized the entire e*vide* nce, on record, and from the closer scrutiny thereof, it has become clear that *w.e.f.* 21.8.1996, the petitioner was engaged as mistry (mason) by the respondent and he worked till 31.3.2000 as is evident from the mandays chart of petitioner Ex. RW-1/C. From the mandays chart Ex. RW-1/C, it is also clear that the petitioner had worked only for 91 days *w.e.f.* 21.8.1996 till 30.3.1997, 92 days *w.e.f.* 21.3.1997 till 20.12.1997, 17 days *w.e.f.* 21.12.1998 till 20.1.1999 and 81 days *w.e.f.* 1.8.1999 till 31.3.2000. Now, the question which arises for consideration before this Court is as to whether the reference is stale and highly belated. The learned counsel for the petitioner contended that under the Industrial Disputes, no limitation is prescribed and the provision of Article 137 of the Limitation Act, 1963 is not applicable to the proceedings under the Act and the relief under the Industrial Disputes Act cannot be denied to the workman merely on the ground of delay.

14. Undisputedly, the petitioner had raised his industrial dispute after a period of more than 11 years. According to the petitioner he was terminated during the year, 2002 but he has failed to produce on record any material which could go to show that he had worked with the respondent till 2002. As per reference sent by the appropriate government to this Court the services of the petitioner were stated to be terminated during April, 2000. It is also clear from the reference itself that the petitioner had raised the industrial dispute after more than 11 years. Therefore, the position of law in respect of a stale claim is required to be seen.

15. **In (2013) 14 SCC 543, titled as Assistant Engineer Rajasthan State Agriculture Marketing Board, Sub Division Kota** Vs. **Mohan Lal,** it has been held by the Hon'ble Apex Court that though the Limitation Act is not applicable to the reference made under the I.D Act but delay in raising industrial dispute is an important circumstance for exercise of judicial discretion in determining relief that is to be granted. The relevant portion of aforesaid judgment is reproduced as under:

> "19. We are clearly of the view that though the Limitation Act, 1963 is not applicable to the reference made under the ID Act but delay in raising industrial dispute is definitely an important circumstance which the Labour Court must keep in view at the time of exercise of discretion irrespective of whether or not such objection has been raised by the other side. The legal position laid down by this Court in Gitam Singh that before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors including the mode and

manner of appointment, nature of employment, length of service, the ground on which termination has been set aside and the delay in raising industrial dispute before grant of relief in an industrial dispute, must be invariably followed."

16. **In Assistant Executive Engineer, Karnataka** Vs. **Shivalinga reported in (2002) 10 SCC 167,** the services of the employee were terminated on 25.5.1985 and he approached the Labour Officer on 17.3.1995 and then the reference was made by the Government to the Labour Court. There was a delay of more than nine years in approaching the Labour Officer. In para 6 of the aforesaid judgment, the Hon'ble Apex Court has held as under :

"Learned counsel for the appellant strongly relied on the reasoning of the Labour Court and contended that the view of the High Court would not advance the cause of justice. Learned counsel for the respondent relied upon two decisions of this Court in Ajaib Singh *vs.* Sirhind Coop. Marketing-*cum*-Processing Service Society Ltd. (1999) 6 SCC 82 and Sapan Kumar Pandit *vs*. U.P. SEB (2001) 6 SCC 222 to contend that there is no period of limitation prescribed under the Industrial Disputes Act to raise the dispute and it is open to a party to approach the Court even belatedly and the Labour Court or the Industrial Tribunal can properly mould the relief by refusing or awarding part-payment of back wages. It is no doubt true that in appropriate cases, as held by this Court in the aforesaid two decisions, such steps could be taken by the Labour Court or the Industrial Tribunal, as the case may be, where there is no such dispute to relationship between the parties as employer and employee. In cases where there is a serious dispute, or doubt in such relationship and records of the employer become relevant, the long delay would come in the way of maintenance of the same. In such circumstances to make them available to a Labour Court or the Industrial Tribunal to adjudicate the dispute appropriately will be impossible. A situation of that nature would render the claim to have become stale. That is exactly the situation arising in this case. In that view of the matter, we think the two decisions relied upon by the learned counsel have no application to the case on hand."

Thus, it has been held that in case there is a serious dispute or doubt in such relationship and the records of the employer become relevant, the long delay would come in the way of maintenance of the same.

17. In Haryana State Coop. Land Development Bank Vs. Neelam reported in (2005) 5 SCC 91, the employee was discontinued from service *w.e.f.* 30.5.1986 and he raised the demand notice on 30.9.1993 and thereafter the reference was sent to the Labour Court by the appropriate government. The Labour Court passed an order answering the reference against the employee holding that the claim was belated. Thereafter, a writ petition was filed before the Hon'ble High Court which was allowed and the employee was directed to be reinstated in service with continuity of service but without back-wages. The Hon'ble Supreme Court set aside the judgment of the High Court and restored the judgment of the Labour Court as a result the reference stood answered against the workman. The relevant portion of the aforesaid judgment is reproduced as under :

13. "In Ajaib Singh (*supra*), the management did not raise any plea of delay. The Court observed that had such plea been raised, the workman would have been in a position to show the circumstances which prevented him in approaching the Court at an earlier stage or even to satisfy the Court that such a plea was not sustainable after the reference was made by the Government. In that case, the Labour Court granted the relief, but the same was denied to the workman only by the High Court. The Court referred to the purport and object of enacting Industrial Disputes Act only with a view to find out as to whether the provisions of the Article 137 of the Schedule appended to the Limitation Act, 1963 are applicable

or no Although, the Court cannot import a period of limitation when the statute does not prescribe the same, as was observed in Ajaib Singh (*supra*), but it does not mean that irrespective of facts and circumstances of each case, a stale claim must be entertained by the appropriate Government while making a reference or in a case where such reference is made the workman would be entitled to the relief at the hands of the Labour Court."

14. "The decision of Ajaib Singh (*supra*) must be held to have been rendered in the fact situation obtaining therein and no ratio of universal application can be culled out therefrom. A decision, as is well-known, is an authority of what it decides and not what can logically be deduced therefrom Bharat Forge Co. Ltd. *Vs.* Uttam Manohar Nakate, JT 2005 (1) SC 303], and Kalyan Chandra Sarkar *vs*. Rajesh Ranjan @ Pappu Yadav & Anr. para 42."

15" In Balbir Singh *vs.* Punjab Roadways and Another [(2001) 1 SCC 133], as regard Ajaib Singh (*supra*), this Court observed :

> 5." The learned counsel for the petitioner strenuously urged that the Tribunal committed error in denying relief to the workman merely on the ground of delay. The learned counsel submitted that in industrial dispute delay should not be taken as a ground for denying relief to the workman if the order/orders under challenge are found to be unsustainable in law. He placed reliance on the decision of this Court in the case of Ajaib Singh *v.* Sirhind Coop. Marketing-*cum*-Processing Service Society Ltd. ((1999) 6 SCC 82: 1999 SCC (L&S) 1054 : JT (1999) 3 SC 38).
>
> 6. "We have carefully considered the contentions raised by the learned counsel for the petitioner. We have also perused the aforementioned decision. We do not find that any general principle as contended by the learned counsel for the petitioner has been laid down in that decision. The decision was rendered on the facts and circumstances of the case, particularly the fact that the plea of delay was not taken by the management in the proceeding before the Tribunal. In the case on hand the plea of delay was raised and was accepted by the Tribunal. Therefore, the decision cited is of little help in the present case. Whether relief to the workman should be denied on the ground of delay or it should be appropriately moulded is at the discretion of the Tribunal depending on the facts and circumstances of the case. No doubt the discretion is to be exercised judicially."

16. "Yet again in Assistant Executive Engineer, Karnataka *vs.* Shivalinga [(2002) 10 SCC 167], a Bench of this Court observed :

> "6. Learned counsel for the appellant strongly relied on the reasoning of the Labour Court and contended that the view of the High Court would not advance the cause of justice. Learned counsel for the respondent relied upon two decisions of this Court in Ajaib Singh *vs*. Sirhind Coop. Marketing-*cum*-Processing Service Society Ltd. (1999) 6 SCC 82 and Sapan Kumar Pandit *vs.* U.P. SEB (2001) 6 SCC 222 to contend that there is no period of limitation prescribed under the Industrial Disputes Act to raise the dispute and it is open to a party to approach the Court even belatedly and the Labour Court or the Industrial Tribunal can properly mould the relief by refusing or awarding part-payment of back wages. It is no doubt true that in appropriate cases, as held by this Court in the aforesaid two decisions, such steps could be taken by the Labour Court or the Industrial Tribunal, as the case may be, where there is no such dispute to relationship between the parties as employer and employee. In cases where there is a serious dispute, or doubt in such relationship and records of the employer become relevant, the long delay would come in the way of maintenance of the same. In such

circumstances to make them available to a Labour Court or the Industrial Tribunal to adjudicate the dispute appropriately will be impossible. A situation of that nature would render the claim to have become stale. That is exactly the situation arising in this case. In that view of the matter, we think the two decisions relied upon by the learned counsel have no application to the case on hand."

17. "In Nedungadi Bank Ltd. (*supra*), a Bench of this Court, where S. Saghir Ahmad was a member [His Lordship was also a member in Ajaib Singh (*supra*) , opined :

"6. Law does not prescribe any time-limit for the appropriate Government to exercise its powers under section 10 of the Act. It is not that this power can be exercised at any point of time and to revive matters which had since been settled. Power is to be exercised reasonably and in a rational manner. There appears to us to be no rational basis on which the Central Government has exercised powers in this case after a lapse of about seven years of the order dismissing the respondent from service. At the time reference was made no industrial dispute existed or could be even said to have been apprehended. A dispute which is stale could not be the subject-matter of reference under section 10 of the Act. As to when a dispute can be said to be stale would depend on the facts and circumstances of each case. When the matter has become final, it appears to us to be rather incongruous that the reference be made under section 10 of the Act in the circumstances like the present one. In fact it could be said that there was no dispute pending at the time when the reference in question was made."

(Emphasis supplied).

18. **In (2006) 5 SCC 433 in case titled as UP State Road Transport Corporation** Vs. **Babu Ram,** the termination was dated 19.9.1983 and the reference was made on 29.8.1998. The Labour Court has held the termination as un-valid without considering the question of delay. The Hon'ble High Court dismissed the writ petition. The Hon'ble Supreme Court has held that no material was placed on record to show that the dispute was raised within reasonable time and the employee was not responsible for delay. The relevant portion of the aforesaid judgment is reproduced as under :

"10. It is to be noted that the High Court has very cryptically disposed of the writ petition. The workman has not placed any material to show that it had raised dispute within a reasonable time, and/or that he was not responsible for delayed decision if any in the conciliation proceedings. It was for him to show that the dispute was raised within a reasonable time and that he was not responsible for any delay. The High Court, on a hypothetical basis has assumed that the dispute might have been raised promptly but delayed by the State Government and he cannot be penalized for delay in finalizing the conciliation proceedings and the reference. But neither the Labour Court nor the High Court has even noted the factual position. The conclusion was based on surmises and conjectures."

19. **In Assistant Engineer, CAD Kota** Vs. **Dhan Kunwar reported in (2006) 5 SCC 481,** the delay was of about eight years in raising the dispute. The Labour Court granted reinstatement with 30 % back-wages. The writ petition and writ appeal filed by the employer were dismissed. However, the Hon'ble Apex Court set aside the judgments of Hon'ble High Court and the Labour Court and held that no relief should have been granted. The relevant portion of the aforesaid judgment is reproduced herein under :

"9. In the background of what has been stated above, the Labour Court should not have granted relief. Unfortunately, learned Single Judge and the Division Bench did not consider

the issues in their proper perspective and arrived at abrupt conclusions without even indicating justifiable reasons……..

20. In **UP State Road Transport Corporation** Vs. **Ram Singh and another (2008) 17 SCC 627,** the termination was dated 15.3.1973 and the reference was dated 15.6.1986 and there was a delay of about 13 years in making the reference. The reference was dismissed on the ground of delay. The relevant portion of the aforesaid judgment reads as under:

> " 7. We are of the view that in the facts and circumstances of the case, the High Court erred in not setting aside the award of the Labour Court. Apart from the unacceptable manner in which the appellant was denied the opportunity of participating in the proceedings, including being debarred from cross- examining the respondent, the Labour Court could not have entertained the industrial dispute given the enormous delay. This Court has in several decisions has held that while delay cannot by itself be sufficient reason to reject an industrial dispute, never the less the delay cannot be un-reasonable. The decision in Prakash Chander Sahu has reaffirmed this principal. The reason for diligence and promptness lies in the fact that the records pertaining to an employee might have been destroyed and it would be difficult to obtain witnesses who would be competent to give evidence so many years later if the Labour Court wishes to hold a further enquiry into the matter. In the present case, the delay of 13 years is unreasonable. The mere fact that the respondent was making repeated representations would not justify his raising the issue before the Labour Court after 13 years. In any event, the last representation was made in 1983 and the industrial dispute was admittedly raised in 1986. The lack of diligence on the part of the respondent is apparent. "

21. **In (2009) 13 SCC 746, State of Karnataka** Vs. **Ravi Kumar** the Hon'ble Supreme Court dismissed the reference on the ground of delay and it was held that the person supervising could not be expected to prove after 14 years that the employee did not work or that he did not work for 240 days or he voluntarily left the job. The relevant portion of the aforesaid judgment reads as under :

> "9. It is not possible to expect the Asstt. Executive Engineer to prove after 14 years that the daily wager did not work or that he did not work for 240 days in a year or that the daily wager voluntarily left the work……

22. In a recent judgment of our Hon' ble High Court delivered in CWP No. 1912 of 2016 titled as Bego Devi *Versus* State of HP and others decided on 26.10.2016, it has been held as under :

> **"9. It is beaten law of land that delay takes away the settings of law. A person who does not seek relief within time, his petition has to be dismissed only on the grounds of delay and laches, otherwise, it would amount to gross misuse of jurisdiction and disturb the settled position".**

23. In view of the aforesaid law laid down by the Hon'ble Apex Court, it is clear that though the Court cannot import the period of limitation and the reference cannot be dismissed merely on the ground of delay, it does not mean that irrespective of the facts and circumstances of the case, a stale claim must be entertained and the relief should be granted. In the case of delay, no formula of universal application can be laid down and it would depend on the facts and circumstances of each case. The delay would certainly be fatal if it has resulted in material evidence relevant to the adjudication being lost and rendered unavailable. The onus of showing that the dispute was raised within a reasonable time is upon the workman and it is for the workman to

explain the delay by furnishing the acceptable explanation to the satisfaction of the Court that he was not responsible for the delay caused. The fact that the workman was making repeated representations/requests is not sufficient to explain the delay.

24. Keeping in view the aforesaid principles laid down by the Hon'ble Apex Court, the facts of this case are required to be seen. The services of the petitioner were stated to be terminated during April, 2000 and he raised the present dispute after a period of more than 11 years. In his evidence by way of affidavit Ex. PW-1/A, the petitioner has averred that after his termination he was assured that on the availability of work and funds, he would be re-engaged but despite assurance given by the respondent, he was not reinstated. However, except for his bald statement there is no other evidence on record to suggest as to when the respondent had given him assurance. No documentary evidence has been produced by the petitioner to prove that he had been visiting the respondent for his re-engagement during the period of 11 years. In the opinion of this Court, the explanation furnished by the petitioner for not raising the demand notice within a reasonable period cannot be accepted. The burden of proof was upon the petitioner to show that the dispute was raised within a reasonable time and to offer an explanation to the satisfaction of this Court for the delay of 11 years caused in seeking reference but the petitioner has failed to discharge his burden. The reference is therefore stale and is liable to be rejected on the ground of delay in raising the dispute.

25. On merits, it is clear that the petitioner was engaged as daily waged beldar by the respondent on 21.8.1996 and he worked as such till 31.3.2000. The petitioner has failed to prove on record that he had worked for 240 days in each calendar year and in preceding twelve months prior to his termination. There is no material on record which could show that the petitioner has completed 240 working days in each calendar year and in twelve calendar months preceding his termination. In **2009 (120) FLR 1007 in case titled as Relip Nagarpalika** Vs. **Babuji Gabhaji Thakore and others,** the Hon'ble Supreme Court has held as under :

> **"The burden of proof lies on the workman to show that he had worked continuously for 240 days for the preceding one year and it is for the workman to adduce evidence apart from examining himself to prove the factum of being in employment of the employer."**

In **AIR 2006 S.C. 110 case titled as Surindernagar District Panchayat** V/s **Dayabhai Amar Singh,** the Hon'ble Supreme Court has held that :—

> **"In case workman claims to have worked for more than 10 years as daily wager. Apart from oral evidence workman has not produced any evidence to prove fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced: no co-worker was examined; muster roll produced by employer has not been contradicted. Workman has failed to discharge his burden that he was in employment for 240 days during preceding 12 months of date of termination of his service. Workman not entitled for protection of Section 25-F before his service was terminated."**

A bare perusal of the extract of the judgment re-produced, hereinabove, shows that the burden to prove completion of 240 days service lies on the workman and this burden is discharged on workman stepping in the witness box and adducing cogent evidence. However, in the instant case, the petitioner has failed to prove on record that he had put in 240 days in each calendar year and in twelve calendar months preceding his termination. There is no iota of evidence which could go to show that the petitioner had completed 240 working days in twelve calendar months preceding his termination. Hence, the case of the

petitioner does not fall under section 25-F of the Industrial Disputes Act, 1947 and as such no protection of section 25-F can be granted to the petitioner.

26. The learned counsel for the petitioner next contended that the respondent has taken the plea of abandonment in its reply but they have totally failed to establish such plea by producing any evidence on record. As pointed out earlier, the Hon'ble Supreme Court has held that the delay would certainly be fatal if it has resulted in material evidence relevant to the adjudication being lost and rendered unavailable. It has also been held by the **Hon'ble Supreme Court in 2009 (13) SCC 746** that the person supervising cannot be expected to prove after long delay that the employee/workman did not work for 240 days in a year or that he voluntarily left the job. It is difficult for the employer to obtain witness/es who would be competent to give evidence so many years later. It has further been held that lapse of time results in losing the remedy and the right as well and the delay in seeking the reference causes prejudice to both the employer and employee. In the present case also it would not be expected from the respondent to lead evidence and to bring witnesses or to place documents on record to prove after 11 years that the petitioner had abandoned the job at his own. The petitioner had raised the industrial dispute after lapse of about 11 years and remained silent during this period without any plausible explanation, and as such, no relief can be granted to him after a lapse of about 11 years as the delay in the present case is certainly fatal.

27. The learned counsel for the petitioner next contended that at the time of the termination of the petitioner, the respondent had retained his juniors and had engaged fresh hands who are still working as such the respondent had violated the principles of "last come first go". In his affidavit Ex. PW-1/A, the petitioner has mentioned the names of some junior persons. However, except for his bald statement there is no evidence on record led by the petitioner to prove that the persons named in para 5 of his affidavit Ex. PW-1/A were his juniors and had been retained by the respondent. It is the specific case of the respondent that only those persons who have completed requisite 240 days in a calendar year continuously and who have fulfilled the criteria as per the policy of the State Government have been regularized. Furthermore, as observed earlier, the petitioner had raised the demand notice after a period of 11 years as such there is no question of consideration of equal treatment with the junior persons who might have been retained. To take this view, I am fortified with the judgment of our own Hon'ble High Court in CWP No. 4515/ 2012 decided on 13.6.2012, titled as Suraj Mani *Vs.* HPSEB wherein it has been held that the petitioners cannot claim equal treatment after about two decades with the juniors who have allegedly been retained. The petitioner who slept for a long period of 11 years is not entitled to claim any relief on the ground of equal treatment. Since, the reference has been proved to be stale and belated as such the protection of sections 25-G and 25-H of the Act cannot be granted to the petitioner. If the alleged termination of petitioner was either illegal or unjustified, he would not have kept silent for a period of 11 years.

28. Thus, keeping in view the above cited rulings and the material fact that the petitioner had raised the industrial dispute after lapse of about 11 years and remained silent during this period without any plausible explanation as such no relief can be granted to him. Hence, it cannot be said that the termination of the services of the petitioner is illegal and unjustified. Consequently, both these issues are decided accordingly.

Issue No. 2

29. Since, the petitioner has failed to prove issue No. 1, above, this issue becomes redundant.

Issue No. 3

30. In support of this issue, no e*vide* nce has been led by the respondent. However, the petitioner has filed this claim petition pursuant to the reference made by the appropriate

government to this Court for adjudication and I find nothing wrong with this petition which is perfectly maintainable. Accordingly, this issue is decided in favour of the petitioner and against the respondent.

Relief

As a sequel to my findings on the aforesaid issues, the claim of the petitioner fails and is hereby dismissed. Consequently, the reference stands answered against the petitioner and in favour of the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced in the open Court today on this 18th day of January, 2018.

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum- *Labour Court,*
Shimla.

18.1.2018.

Present: None for petitioner

Ms. Lalita, Advocate vice csl. for respondent

Case called twice but none appeared on behalf of the petitioner. It is 10.55 A.M. Be awaited.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

Case called again.

Present: None for petitioner

Ms. Lalita, Advocate vice csl. for respondent

It is 12.35 P.M. Case called again but none appeared on behalf of the petitioner. Be called after lunch.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

Case called after lunch

18.1.2018.

Present: None for petitioner

Ms. Lalita, Advocate vice csl. for respondent

It is 3.25 P.M. Case called repeatedly in pre and post lunch sessions but none appeared on behalf of the petitioner. For today, the case has been listed for filing of reply on behalf of petitioner to application under order 9 rule 7 CPC filed by the respondent for setting aside the *ex-parte* order dated 20.11.2017 but neither the petitioner nor his counsel appeared before this Court which clearly shows that at present the petitioner is not interested to pursue his case arising out of reference. Therefore, I have left with no other alternative but to decide the reference on the basis of material whichever is available on the file. The following reference has been sent by the appropriate government for adjudication :

> "Whether termination of the services of Shri Sunil Kumar s/o Shri Dhyan Singh r/o Village Tharu, P.O Shari, Tehsil Theog, District Shimla HP by the Chief Executive Officer, Shimla Environment Heritage Conservation and Beautification Society (SEHB), Municipal Corporation Shimla *w.e.f.* 10.4.2013 is legal and unjustified? If not, what relief of reinstatement, back-wages, compensation, seniority and other service benefits the above aggrieved workman is entitled to from the above employer/society?"

Therefore, from the aforesaid reference, it is clear that the petitioner has alleged his termination *w.e.f.* 10.4.2013 without complying with the provisions of Industrial Disputes Act, 1947 to be illegal and unjustified. Though, in his evidence by way of affidavit Ex. PW-1/A, the petitioner stated that he had completed 240 days in each calendar year. However, except for his bald statement there is no other evidence on record to suggest that he had completed 240 days in each calendar year. The petitioner has failed to produce any muster roll or mandays chart having been issued by the respondent in order to prove that he had completed 240 days in each calendar year. Therefore, in the absence of any material on record, it cannot be said that the services of the petitioner had been illegally terminated by the respondent *w.e.f.* 10.4.2013. Hence, the reference is answered against the petitioner and the award is passed accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced:
18.1.2018.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

IN THE COURT OF SUSHIL KUKREJA, PRESIDING JUDGE, HP INDUSTRIAL TRIBUNAL-CUM**-LABOUR COURT, SHIMLA**

Ref No. 43 of 2016
Instituted on 6.5.2016
Decided on 17.1.2018

Ravinder Kumar s/o Late Shri Amar Nath, VPO Nanwan, Tehsil Ghumarwin, District Bilaspur, H.P. Through Shri J.C Bhardwaj, President HP AITUC

..Petitioner

VS.

M/s Innova Captab, 81-B-EPIP, Phase-1, Jharmajri, Baddi, District Solan through its Managing Director

..Respondent

Reference under section 10 of the Industrial Disputes Act, 1947

For petitioner : Shri J.C Bhardwaj, AR

For respondent : Shri Ajit Singh Saklani, Advocate

AWARD

The reference for adjudication, sent by the appropriate government, is as under:

"Whether termination of services of Shri Ravinder Kumar s/o Late Shri Amar Nath, VPO Nanwan, Tehsil Ghumarwin, District Bilaspur, HP by the employer/general manager, M/s Innova Captap, 81-B, Phase-1, Jharmajri, Tehsil Baddi, District Solan, HP *w.e.f.* 3.8.2015 without complying with the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is legal and justified? If not what amount of back-wages, seniority, past service benefits and compensation the above ex-worker is entitled to from the above employer/management?"

2. Briefly, the case of the petitioner is that on 1.2.2008, he was appointed as a workman but designated as Assistant Store Keeper and the duties assigned to him, were manual and clerical in nature. It is further stated that the petitioner was performing non-supervisory, non-administrative and non-managerial duties since the time of his appointment with the respondent till his termination *i.e* on 3.8.2015, hence the petitioner is covered under the definition of "workman" for the purpose of section 2(s) of the Industrial Disputes Act ,1947 (hereinafter referred to as Act) and it is not the designation and salaries drawn by the person to determine his status whether the concerned person is a workman or working in managerial capacity but it is only nature of duties performed by the person which are decisive while determining his status as a workman. That the petitioner had worked for 8 years with the neat and clean records with continuous service for the purpose of section 25-B of the Act and he had worked for more than 240 days in every calendar year during the tenure of his service and also in twelve calendar months preceding to his termination, hence, the termination of services of the petitioner is invalid, nonest in the eyes of law due to lapse on the part of management in compliance of mandatory provisions of section 25-F of the Act and that too without proving the alleged charges of misconduct. That the sudden removal of the petitioner from the employment has made his integrity doubtful in the eyes of one and all and he is unemployed since the date of his illegal termination and the respondent has caused heavy damage to the petitioner in status and civil consequences and even the respondent deliberately has committed breach of section 25-G and 25-H of the Act as a senior employee was removed by the respondent while his juniors and fresh hands were employed to carry out the same work. It is also stated that the management has not served any show cause notice and further no enquiry was ever held against the petitioner for alleged absence from duty. Against this back-drop a prayer has been made that the respondent management be directed to reinstate the petitioner in employment retrospectively with full back-wages, seniority and other consequential service benefits.

3. By filing reply, the respondent contested the claim of the petitioner wherein preliminary objections have been taken qua maintainability as the petitioner was not a workman under section 2(s) of the Act and some persons namely S/Shri Suresh Kumar, Rakesh Kumar and Ajay Singh were working under his supervision, hence the petitioner was discharging the supervisory work and he cannot be termed as a workman, that the petitioner had abandoned the job

at his own, that the petitioner has joined at Aristo Pharma Ltd., Baddi and that the petitioner has suppressed the true and material facts from this Court. On merits, it has been asserted that the petitioner was performing his duties in the capacity of Assistant Incharge and he was responsible to look-after in-out process of raw material. It is further asserted that the petitioner had abandoned the job at his own and he was never retrenched/terminated on 3.8.2015 by the respondent. It is denied that the main work which was being performed by the petitioner was totally manual as well as clerical. It is asserted that the store department of the respondent is not under manual type of work as there is computerized facilities and without debiting material which has been issued from the department, cannot move to production department. That the respondent has not violated any mandatory and statutory norms under section 25-F of the Act. It is denied that the management removed a senior employee while retaining the junior workmen, even fresh hands were employed to carry out the same work which was being done by the petitioner. The respondent prayed for the dismissal of the claim petition.

4. By filing rejoinder, the petitioner reiterated the averments made in the claim petition by denying those of the respondent.

5. On the pleadings of the parties, the following issues were framed on 28.2.2017:

(1) Whether the termination of the services of petitioner *w.e.f.* 3.8.2015 without complying with the provisions of Industrial Disputes Act, 1947 is illegal and unjustified as alleged?

OPP……..

(2) If issue No. 1 is proved in affirmative, to what relief of service benefits the petitioner is entitled?

OPP……..

(3) Whether the claim petition is not maintainable as alleged?

OPR……..

(4) Whether the petitioner is not a workman as alleged?

OPR…….

(5) Whether the petitioner has left the job at his own as alleged?

OPR…….

(6) Relief.

6. I have heard the AR for the petitioner and learned counsel for the respondent and have also gone through the record of the case.

7. For the reasons to be recorded hereinafter while discussing issues for determination my findings on the aforesaid issues are as under.

Issue No. 1 Yes

Issue No. 2 Entitled to reinstatement with seniority and continuity but without back-wages

Issue No. 3 No

Issue No. 4 No

Issue No. 5 No

Relief Reference answered in favour of the petitioner and against the respondent per operative part of award.

Reasons for findings

Issues No. 1, 4 and 5

8. Being interlinked and correlated both these issues are taken up together for discussion and decision.

9. The AR for the petitioner contended that the services of the petitioner had been terminated by the respondent illegally without serving him any notice as required under section 25-F of the Act especially when he had completed more than 240 days in each calendar year. He further contended that the junior persons to the petitioner are still working with the respondent and fresh workers have been engaged in violation of the provisions of section 25-G and 25-H of the Act. He also contended that the petitioner was performing non-supervisory, non-administrative and non-managerial duties and was only performing the work of manual as well as clerical in nature, hence, he falls under the category of "workman" as per section 2(s) of the Act.

10. On the other hand, counsel for the respondent contended that the petitioner was not a workman under section 2(s) of the Act as he was discharging the supervisory work and he cannot be termed as a workman. He further contended that the services of the petitioner were never terminated by the respondent management but he himself had abandoned the job without any intimation to the respondent.

11. To prove issue No. 1, the petitioner stepped into the witness box as PW-1 to depose that he was engaged by the respondent company on 1.2.2008 as Assistant Store Keeper and he was doing manual as well as clerical work and also used to maintain the record. He further deposed that he had worked continuously for 8 years and had completed 240 days in the preceding twelve calendar months and no appointment letter was issued to him. He also stated that he had gone on leave from 28.7.2015 to 1.8.2015 which was duly sanctioned but when he came to join his duties, he was not allowed to enter inside the factory gate. He stated that neither any show cause notice nor any chargesheet was issued to him and no enquiry was conducted against him. He further deposed that neither any notice nor compensation was paid to him and he is unemployed these days. In cross-examination, he denied that S/Shri Suresh Kumar, Rakesh Kumar and Ajay Singh were working under his supervision. He further denied that he had left the job at his own because he had joined the services at Aristo Pharma Ltd., Baddi. He also denied that the respondent company had asked him telephonically to join but he had refused. He denied that he was working as a supervisor.

12. On the other hand, the respondent has examined three RWs. Shri Dinseh Kumar, Store incharge of respondent company appeared into the witness box as RW-1 to depose that the petitioner was working as Assistant Store Incharge in the company and 5 to 6 helpers were working under the supervision of petitioner. He further deposed that the petitioner used to go on leave with his permission and after availing the leave the petitioner did not report to him for his joining. He also deposed that the petitioner refused to join the duties telephonically and told him that he had joined somewhere else. In cross-examination, he denied that the petitioner was working as Assistant Store keeper. He admitted that the petitioner as well as other helpers were working under store incharge. He further admitted that no letter was issued to the petitioner for resumption of his duties. He also admitted that no show cause notice and chargesheet was issued to the petitioner for

his absence from duties and no enquiry was conducted against him. He denied that the services of the petitioner were terminated illegally.

13. RW-2 Shri Suresh Kumar Store Helper with the respondent company deposed that the petitioner was his senior who used to sanction his leave and he was working under his (petitioner) supervision. In cross-examination, he admitted that the store Incharge used to assign him the work and his leaves were used to be sanctioned by the Store Incharge. RW-3 Shri Atma Ram, Store Helper with the respondent company supported the entire version of RW-2 in his examination-in-chief. In cross-examination, he admitted that no summon was issued to him by the Court to appear as a witness but volunteered that he had been directed by his senior Mr. Rana to depose in the case today. He further admitted that he is working under the supervision of Store Incharge.

14. I have closely scrutinized the entire evidence, on record, and from the closer scrutiny thereof it has become clear that the petitioner was appointed on 1.2.2008. The plea which has been taken by the respondent is to this effect that since he was performing his duties in the capacity of Assistant Store Incharge and discharging the supervisory work, therefore, his case does not fall under the category of workman as prescribed in section 2 (s) of the Act. Now, this Court is required to ascertain as to whether the petitioner falls within the category of workman or not as per section 2 (s) of the Act. At this juncture, it would be relevant to re-produce section 2 (s) of the Act, which reads as under:

> "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person :
>
> (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
>
> (ii) who is employed in the police service or as an officer or other employee of a prison; or
>
> (iii) who is employed mainly in a managerial or administrative capacity; or
>
> (iv) who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

15. It is a settled provision of law that in determining as to whether a person is a workman or not, the Court has to principally see the main or substantial work for which he was employed. Neither the designation nor any incidental work done by him will get him out-side the preview of the Act. **The Hon' ble Supreme Court in (1994) 5 S.C.C 737, titled as H.R Adyanthaya and others** Vs. **Sandoz (India) Ltd. and another** has held that for an employee to be covered by the definition of workman he must be employed in any industry to do any manual, un-skilled, skilled, technical, operational, clerical or supervisory work. If he falls within these categories, it has then to be seen whether he comes within any of the four excluded categories mentioned in section 2 (s) of the Act. The relevant portion of the aforesaid judgment reads as under :

> 24……. Hence, the position in law as it obtains today is that a person to be a workman under the ID Act must be employed to do the work of any of the categories, viz., manual,

unskilled, skilled, technical, operational, clerical or supervisory. It is not enough that he is not covered by either of the four exceptions of the definition. We reiterate the said interpretation."

16. **In case reported in 2006-III LLJ (767) titled as Anand regional Co.op. Oil Seedsgrowers Union Ltd.** Vs. **Shailesh Kumar Harshad Bhai Shah,** the Hon'ble Supreme Court has observed as under:

"For determining the question as to whether a person employed in an industry is a workman or not; not only the nature of work performed by him but also terms of the appointment in the job performed are relevant considerations"

"Supervision contemplates direction and control. While determining the nature of the work performed by an employee, the essence of the matter should call for consideration. An undue importance need not be given for the designation of an employee, or the name assigned to the class to which he belongs. What is needed to be asked is as to what are the primary duties he performs. For the said purpose, it is necessary to prove that there were some persons working under him whose work is required to be supervised. Being incharge of section alone and that too it being a small one and relating to quality control would not answer the test."

17. Therefore, the ratio of the aforesaid decisions makes it clear that for determining the question as to whether a person employed in an industry is a workman or not, the nature of the work performed by him is the main determining factor and his designation is immaterial. In the present case, as per the case of the petitioner, he was appointed as Assistant Store Keeper on 1.2.2008. In his statement as PW-1, the petitioner deposed that he had been doing manual as well as clerical work and also used to maintain the record. He further deposed that he was not doing any administrative and managerial work. Therefore, the onus was upon the respondent to prove by leading cogent and satisfactory evidence on record that the petitioner was discharging the duties of supervisor and he was doing managerial work. However, no cogent and satisfactory evidence has been led by the respondent to this effect. Rather, RW-1 admitted in cross- examination that the petitioner as well as the other helpers were working under the Store Incharge. Though, RW-2 and RW-3 in their examination in chief deposed that they were working under the supervision of petitioner and he used to sanction their leaves. However, in cross-examination RW-2 admitted that the store incharge used to assign him the work. He also admitted that the store incharge used to sanction his leaves and in the absence of store incharge, the petitioner used to sanction his leaves. RW-3 also admitted in cross- examination that he was working under the supervision of store incharge. Therefore, in view of the entire evidence led by the parties, it cannot be said that the petitioner was discharging the supervisory work. Merely because the petitioner had sanctioned leaves in the absence of store incharge, it cannot be said that he was discharging the managerial and supervisory functions. In **M/s Sikand & Company** vs. **State of H.P. and others (2007) 2 Latest HLJ, 763,** our own Hon'ble High Court has held that the store incharge has to be treated as workman and merely because the workman may have discharged supervisory and managerial functions off and on, he cannot be treated to be working in managerial or supervisory capacity. The relevant portion of the aforesaid judgment reads as under :

"14. A number of documents have been filed by both the parties. After going through the entire evidence, it is proved that basically the employee was a workman though he may have been given the high sounding designation of Assistant Manager. It is apparent that his main duties were as Store incharge in which capacity he used to purchase, sell and hand over spare parts and maintain the record thereof. In such capacity, he also maintained bin cards and cardex register. It is also apparent that in the absence of the Branch Manager, the

petitioner/employee at times were doing supervisory functions. However, we are of the considered view that merely because he may have discharged supervisory and managerial functions off and on, this cannot detract from the basic fact that he was working as Store Incharge. In our opinion, the store incharge has to be treated as a workman and cannot be treated to be working in managerial or supervisory capacity."

In the instant case the petitioner was working as Assistant Store Incharge and he was not having any authority to appoint anyone or to initiate enquiry against any person. The duties of the petitioner were of manual and clerical nature and he was not performing any supervisory and managerial function. Therefore, in view of the entire e*vide* nce led before this Court, the petitioner might have been given a designation of Assistant Store Incharge, however, it cannot be said that he was performing managerial and supervisory functions with the respondent and as such he can be said to be a workman as defined under section 2 (s) of the Act.

18. The learned counsel for the respondent next contended that the petitioner himself had abandoned the job and he was not retrenched by the respondent. However, there is no iota of evidence on record which could go to show that the petitioner had left the job on his own as no notice or letter regarding abandonment of the job by the petitioner is placed on record by the respondent. Even RW-1 Shri Dinesh Kumar, Store Incharge has admitted in cross-examination that no notice was issued to the petitioner for resumption of his duties. Therefore, in the absence of any evidence on record, inference cannot be drawn that the petitioner had abandoned the job. Reliance is placed on decision reported in **AIR 1979 SC 582 case titled as G.T Lad and others** Vs. **Chemicals and Fibers India Ltd.** where it has been held that :

"From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham Co. *v.* Venkatiah (1964) 4 SC R 265: (AIR 1964 SC 1272), it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to an employee without adequate evidence in that behalf. Thus whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case."

In the instant case also no evidence has been led by the respondent that the petitioner had abandoned the job with an intention not to resume the same. Hence, it cannot be said that the petitioner had left the job at his own.

19. From the closer scrutiny of the record, it has become clear that the petitioner was engaged on 1.2.2008 and he worked till 3.8.2015. In his statement as PW-1, the petitioner categorically deposed that he had worked continuously for eight years and had completed 240 days in the preceding 12 calendar months. The evidence led by the petitioner has not been successfully rebutted by the respondent. Therefore it has become clear that the petitioner had completed 240 working days in twelve calendar months preceding his termination. It is also an admitted fact that neither any notice had been issued to the petitioner nor he was paid any retrenchment compensation. Therefore, before terminating the services of the petitioner, it was incumbent upon the respondent to have complied with the provisions of section 25-F of the Act which lay down certain conditions precedent to the retrenchment of a workman (workmen) and requires the

employer to comply with those conditions as per clauses (a) to (c) which are mandatory in nature. However, in the present case, the perusal of the record shows that the respondents have failed to comply with the provisions of section 25-F of the Act. **In (2015) 4 SCC 544, Mackinnon Mackenzie and Company Ltd.** Vs. **Mackinnon employees Union,** the Hon'ble Apex Court has held as under :

> "34. ……The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25F clauses (a) and (c) of the I.D. Act which are mandatory in law."

20. In the present case also as observed aforesaid, the respondent has failed to comply with the provisions of section 25-F of the Act before terminating his services. Hence, in view of the law laid down by the Hon'ble Supreme Court (*supra*) and my foregoing observations, I have no hesitation in holding that the termination/disengagement of the services of the petitioner *w.e.f* 3.8.2015 by the respondent without complying with the provisions of section 25-F of the Act, is illegal and unjustified. Hence, All the aforesaid issues are decided accordingly in favour of the petitioner and against the respondent.

Issue No. 2

21. Since, I have held under issues No. 1, 4 and 5 above that the termination of services of the petitioner by the respondent without following the provisions of the Act is illegal and unjustified. Therefore, the petitioner is held entitled to reinstatement in service with seniority and continuity.

22. Now, the question which arises for consideration, before this Court is as to whether the petitioner is entitled to full back wages as contended by the AR for the petitioner. In **(2009) 1 SCC 20, Kanpur Electricity Supply Company Limited** Vs. **Shamim Mirza**, the Hon'ble Supreme Court has held that once the order of termination of services of an employee is set-aside, ordinarily, the relief of reinstatement is available to him. However, the entitlement of an employee to get reinstated does not necessarily result in payment of full or partial back-wages, which is independent of reinstatement. It has further been held by the **Hon'ble Supreme Court in 2010 (1) SLJ S.C 70, M/s Ritu Marbals** Vs. **Prabhakant Shukla** that full back wages cannot be granted mechanically, upon an order of termination be declared illegal. It is further held that reinstatement must not be accompanied by payment of full back wages even for the period when the workman remained out of service and contributed little or nothing to the Industry.

23. Moreover, the petitioner was under an obligation to prove by leading cogent e*vide* nce that he was not gainfully employed after the termination of his services. The initial burden is on the workman/employee to show that he was not gainfully employed as held by **the Hon' ble Apex Court in (2005) 2 Supreme Court Cases 363 titled as Kendriya Vidyalaya Sangathan and another** Vs. **S.C Sharma** that :

"16……..When, the question of determining the entitlement of a person to back-wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim……."

24. In the present case, the petitioner has failed to discharge his burden by placing any material on record that he was not gainfully employed after his termination/disengagement. Except for the bald statement of the petitioner, there is no other evidence on record which could go to show that after his termination, he was not gainfully employed. Therefore, in view of the aforesaid judgments of the Hon'ble Supreme Court, I have no hesitation in holding that the petitioner is not entitled to any back-wages. Accordingly, issue No. 2 is partly decided in favour of the petitioner and against the respondent.

Issue No. 3

25. The petitioner has filed the present claim petition consequent upon the reference having been sent by the appropriate government for adjudication to this Court. But, in support of this issue, no evidence was led by the respondent. However, I find nothing wrong with this petition which is perfectly maintainable. Hence, this issue is decided in favour of the petitioner and against the respondent.

Relief

As a sequel to my above discussion and findings on issues No. 1 to 5, the claim of the petitioner succeeds and is hereby partly allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity. However the petitioner is not entitled to back wages as such the reference is ordered to be answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records.

Announced in the open Court today on this 17th day of January, 2018.

(SUSHIL KUKREJA)
Presiding Judge,
Industrial Tribunal-cum- *Labour Court, Shimla.*

———

1.1.2018.

Present: None for the petitioner
Shri Mahender Singh, ADA for respondent

Case called twice but neither the petitioner nor any counsel on his behalf has appeared before this Court. It is 10.40 A.M. Be called again.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

Case called again

Present: None for the petitioner
Shri Mahender Singh, ADA for respondent

It is 12.40 P.M. Case called again. But neither the petitioner nor any counsel on his behalf has appeared before this Court. Be called after lunch.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

Case called after lunch

Present: None for the petitioner
Shri Mahender Singh, ADA for respondent

It is 3.25 P.M. Case called repeatedly in pre and post lunch sessions but neither the petitioner nor any counsel on his behalf has appeared before this Court. The record reveals that after the receipt of reference from the appropriate government, this Court issued notice to the parties and on 7.12.2017, the petitioner appeared himself before this Court and the case was adjourned for today *i.e* 1.1.2018 for filing of claim. Since, the petitioner has failed to appear before this Court and to file statement of claim, I am left with no other alternative but to decide the reference on the basis of material whatsoever is available on the file.

The following reference has been sent by the appropriate government for adjudication to this Court :

> "Whether time to time break in service given to Shri Shre Dev s/o Shri Khem Singh, r/o Village Khalagwar, P.O. Shegali, Tehsil Sadar, Distt. Mandi, H.P. during the period from June, 2008 to February, 2010, by the Executive Engineer, I & PH Division, Pooh, Distt. Kinnaur, H.P., is legal and justified? If not, what service and back wages, the above workman is entitled to from the above employer?"
>
> "Whether change of the service conditions of the workman Shri Shre Dev s/o Shri Khem Singh from daily wage basis to contractual basis (through contractor), by the Executive Engineer, I&PH Division, Pooh, Distt. Kinnaur, H.P. without complying with the provisions of section 9 A of the Industrial Disputes Act, 1947 is legal and justified? If not, what service benefits including seniority, continuity of service and back wages, the above workman is entitled to from the above employer?"

Therefore, from the perusal of the aforesaid reference it is clear that the petitioner has alleged time to time break in service given to him during the period from June, 2008 to February, 2010, by the respondent as illegal and unjustified. He further alleged change in the service conditions from daily wages basis to contractual basis (through contractor) by the respondent without complying with the provisions of section 9-A of the Act to be illegal and unjustified but in support of his contention as raised in the reference, the petitioner has failed to appear before this Court and to file statement of claim. Therefore, in the absence of any material on record, it cannot be said that time to time break in service given to the petitioner during the period from June, 2008

to February, 2010, by the respondent and that change in the service conditions from daily wages basis to contractual basis (through contractor) by the respondent without complying with the provisions of section 9-A of the Act is illegal and unjustified. Hence, the reference is answered against the petitioner and the award is passed accordingly. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: 1.1.2018.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

20.1.2018.

Present: None for petitioner

Shri Prateek Kumar, Advocate *vice* Shri Rahul Majahan, Advocate for respondent

It is 10.45 A.M. Case called twice but none appeared on behalf of the petitioner. As per the Track Consignment report the notice issued to the petitioner has been duly served but despite that he has not appeared before this Court. Be awaited.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

Case called again

Present: None for petitioner
Shri Prateek Kumar, Advocate *vice* Shri Rahul Majahan, Advocate for respondent

It is 12.40 P.M. Case called again but none appeared on behalf of the petitioner. Be called after lunch.

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

Case called after lunch

Present: None for petitioner
Shri Prateek Kumar, Advocate vice Shri Rahul Majahan, Advocate for respondent

It is 3.15 P.M. Case called repeatedly in pre and post lunch sessions but neither the petitioner nor any counsel on his behalf has appeared before this Court. For today, the case has been listed for the service of the petitioner but as per track consignment report, despite having been served none appeared before this Court which clearly shows that the petitioner is not interested to pursue this case arising out of the reference. Therefore, this Court is left with no other alternative but to decide the reference on the basis of material whichever is available on file.

The following reference has been received from appropriate government for adjudication :

"Whether termination of services of Shri Jai Dev, r/o Village Shamsher Garh, P.O. Shivpur, Tehsil Paonta Sahib, Distt. Sirmour, H.P. on 12.5.2016, by the management of M/s Akorn India Pvt. Limited, Nihalgarh, Tehsil Paonta Sahib, Distt. Sirmour, allegedly without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, what relief including reinstatement, amount of back wages, past service benefits and compensation the above ex-worker is entitled to from the above employer/management?"

From the aforesaid reference is the clear that the petitioner has alleged his termination of services *w.e.f.* 12.5.2016 to be illegal but despite having been served, the petitioner has failed to appear before this Court. Since, the petitioner has failed to appear before this Court and to file statement of claim, therefore, in the absence of any material on record, it cannot be said that the termination of the services of the petitioner *w.e.f.* 12.5.2016 without complying with the provisions of the Industrial Disputes Act, 1947 is illegal and unjustified. Hence, the reference is answered in the negative. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.

Announced: 20.1.2018

(SUSHIL KUKREJA)
Presiding Judge,
Labour Court, Shimla.

ब अदालत विवाह पंजीकरण अधिकारी, बड़सर, उप–मण्डल बड़सर, जिला हमीरपुर, हि0 प्र0

1. Manoj Kumar s/o Sh. Bal Krishan, r/o Vill. Bhalat, P.O. Harsour, Teh. Barsar, Distt. Hamirpur H.P.

2. Vipin d/o Sh. Bilku Ram, r/o Vill. Nigani, P.O. & Tehsil Nichar, Distt. Kinnaur (H.P.)

.. प्रार्थी।

बनाम

आम जनता .. प्रतिवादी।

आम जनता को सूचित किया जाता है कि प्रार्थी एक व दो ने इस न्यायालय में विवाह पंजीकरण करवाने का आवेदन किया है। अतः इस इश्तहार द्वारा आम जनता व उपरोक्त आवेदनकर्ता के माता–पिता को इस विवाह के पंजीकरण बारे एतराज हो तो दिनांक 05–06–2018 या इससे पूर्व प्रातः 10.00 बजे इस न्यायालय में आपत्ति दर्ज करवा सकते हैं। इस तिथि के बाद कोई उजर स्वीकार नहीं किया जावेगा।

आज दिनांक 12–05–2018 को मेरे हस्ताक्षर एवं मोहर अदालत द्वारा जारी किया गया।

मोहर। हस्ताक्षरित / –
विवाह पंजीकरण अधिकारी,
बड़सर, उप–मण्डल बड़सर, जिला हमीरपुर, हि0 प्र0।

————————

In the Court of Dr. Amit Guleria, H.A.S., Marriage Officer-cum-Sub Divisional Magistrate, Kullu, District Kullu, H.P.

In the matter of :

1. Yogesh Kumar s/o Shri Man Singh, Village Dev Nal, P. O. Sehli, Tehsil Kotli, District Mandi, Himachal Pradesh.

2. Byas Ganga d/o Shri Fathe Chand, Village Bhadauli, P.O. Sachani, Tehsil Bhuntar, District Kullu, Himachal Pradesh . . *Applicants.*

Versus

General Public

Subject.—Proclamation for the registration of Marriage under section 16 of Special Marriage Act, 1954.

Yogesh Kumar and Byas Ganga filed an application alongwith affidavits in the court of undersigned under section 16 of Special Marriage Act, 1954 that they have solemnized their marriage on 14-02-2011 and they are living as husband and wife since then, hence their marriage may be registered under Act, *ibid.*

Therefore, the general public is hereby informed through this notice that any person who has any objection regarding this marriage can file the objection personally or writing before this court on or before 03-06-2018. The objection received after 03-06-2018 will not be entertained and marriage will be registered accordingly.

Issued today on 03-05-2018 under my hand and seal of the court.

Seal. Dr. AMIT GULERIA (HAS),
Marriage Officer-cum-*Sub Divisional Magistrate,*
Kullu, District Kullu, H.P.

ब अदालत सहायक समाहर्ता द्वितीय श्रेणी धामी, जिला शिमला, हि0 प्र0

मुकद्दमा संख्या : 01 / 2018 तारीख मजरुआ : 05–03–2018 तारीख पेशी : 26–05–2018

श्री कृष्ण लाल पुत्र स्व0 श्री दुली चन्द, निवासी ग्राम बझोल, डाकघर थाची, उप–तहसील धामी, जिला शिमला, हि0 प्र0।

राजस्व अभिलेख में नाम दरुस्ती बारे प्रार्थना–पत्र।

इस मुकद्दमें का संक्षिप्त सार यह है कि उपरोक्त प्रार्थी के पिता स्व0 श्री दुली चन्द पुत्र ऋतूराज, निवासी ग्राम बझोल, डाकघर थाची, उप–तहसील धामी, जिला शिमला, हिमाचल प्रदेश ने प्रार्थना–पत्र इस आशय के साथ इस अदालत में प्रस्तुत किया है कि भू–राजस्व अभिलेख मौजा बझोल में प्रार्थी के पिता का नाम बुली चन्द पुत्र श्री रितुराज दर्ज कागजात है जो कि गलत है जबकि शपथ–पत्र, आधार कार्ड, नकल परिवार रजिस्टर, भारत निर्वाचन आयोग पहचान–पत्र व ब्यानात ग्राम निवासी के अनुसार प्रार्थी का नाम दुली चन्द पुत्र ऋतु राज है जो कि सही है। अतः इश्तहार द्वारा सूचित किया जाता है कि यदि किसी को भी उपरोक्त मुकद्दमा नाम दरुस्ती बारे कोई उजर व एतराज हो तो स्वयं या लिखित तौर पर दिनांक 26–05–2018 को अपराह्न 2.00 बजे हाजिर अदालत आकर अपना एतराज पेश करें अन्यथा यह समझा जायेगा कि किसी भी सम्बन्धित व्यक्ति को इस मुकद्दमा नाम दरुस्ती बारे कोई उजर व एतराज न है तथा आवेदन–पत्र को अन्तिम रूप दिया जायेगा व एकतरफा कार्यवाही अमल में लाई जाएगी।

आज दिनांक 26–04–2018 को मेरे हस्ताक्षर व मोहर अदालत से जारी किया गया।

मोहर। हस्ताक्षरित / –
सहायक समाहर्ता द्वितीय श्रेणी,
उप–तहसील धामी, जिला शिमला, हिमाचल प्रदेश।

नियन्त्रक, मुद्रण तथा लेखन सामग्री, हिमाचल प्रदेश, शिमला–5 द्वारा मुद्रित तथा प्रकाशित
इलेक्ट्रॉनिक हस्ताक्षरित राजपत्र, वैबसाइट http://rajpatrahimachal.nic.in पर उपलब्ध है एवम् ऑनलाइन सत्यापित किया जा सकता है